# Analysis&Perspective

**INFORMATION QUALITY ACT**

The Information Quality Act was enacted as part of the fiscal 2001 omnibus spending bill. It requires the Office of Management and Budget to issue ''policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity'' of information that is ''disseminated'' to the public. The author of this article says the Information Quality Act can be a force for greater transparency and accountability in government. He suggests that for the law to succeed, the public discourse about it will need to change. When a modest sunshine statute articulating easily accepted values gives rise to a storm of polarized perspectives, he says, it is time to take stock of where we are.

## The Information Quality Act: How a Sunshine Statute Brought a Perfect Storm

BY MARK A. GREENWOOD

One of the more surprising current controversies in federal policy concerns the Information Quality Act (IQA), a brief statute enacted in 2001 to improve the ''quality, objectivity, utility and integrity'' of information that federal agencies ''disseminate'' to the public. How this simple law has become so controversial is a reflection of our times. Political polarization and a distrust of motives among various interest groups have frustrated what could be a modest, productive advance in public discourse about federal policy in a variety of areas.

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*The opinions expressed here do not represent those of BNA, which welcomes other points of view.*

The IQA has been characterized by some as a ''time-bomb waiting to detonate,''[1] while others have suggested that this statute will have ''the most profound impact on federal regulations since the Administrative Procedure Act was enacted in 1946.''[2] Such statements overstate the law's impact and obfuscate its real value. Properly understood, the IQA is a modest step toward a more transparent and accountable government that enhances democracy in an information-saturated society.

### History of the Information Quality Act

The Information Quality Act was enacted as Section 515 of the Fiscal Year 2001 Consolidated Appropriations Act (P.L. 106-554). The statute required the Office of Management and Budget (OMB) to issue ''policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity'' of information that is ''disseminated'' to the public. This guidance was to require agencies to issue their own guidelines on this subject, establish ''administrative mechanisms'' for ''affected persons'' to request correction of information, and report periodically to OMB.

The IQA has a limited pedigree. The statute was not the subject of Congressional hearings, floor statements or illuminating committee reports. The IQA is, however, a logical extension of prior statutory mandates found in

[1] Chris Mooney, *Paralysis by Analysis*, WASHINGTON MONTHLY, May 2004.

[2] *See Daily Environment Report* statement attributed to William Kovacs, U.S. Chamber of Commerce (''OMB Guidelines on Quality of Information Seen as Having Profound Impact on Agencies,'' 9 DEN B-1, 1/14/02).

the Paperwork Reduction Act (PRA). Specifically, 44 U.S.C. § 3504(e) indicates that OMB must assure the ''integrity, objectivity, impartiality, utility and confidentiality of information collected for statistical purposes.'' Moreover, under 44 U.S.C. § 3506(b), each agency shall ''improve the integrity, quality and utility of information to all users within and outside the agency, including capabilities for ensuring dissemination of public information, public access to government information and protections for privacy and security.''[3] In addition, Congress had indicated in previous appropriations act reports that OMB should issue rules for agencies related to information quality.[4]

Given the limited statutory text and legislative history, OMB had significant discretion to define the scope of the IQA Guidelines. OMB undertook a substantial effort, engaging a range of agencies and the public, to produce the IQA Guidelines, which were issued in February of 2002.[5] These Guidelines contain important policy and procedural refinements of the statute:

- The Guidelines were applied broadly to actions by federal agencies. For example, information developed in rulemaking was included within the IQA mandate. OMB also resisted calls by agencies for very broad exemptions to the applicability of the IQA.
- OMB amplified several of the key IQA terms such as ''objectivity'' to address both the substance and presentation of information. The Guidelines introduced the idea that technical analyses should be ''reproducible'', meaning that they are sufficiently explained to allow someone else to replicate the analysis. Thematically, these refinements called for greater transparency of the information and analysis underlying governmental decisionmaking.
- As a guide for the ''objectivity'' standard for scientific assessments, OMB directed agencies to adopt or adapt the risk assessment and risk communication principles contained in the Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(A).
- The Guidelines established a structured correction request and review process, including an appeal right within an agency and deadlines for agency decisions.
- Agencies were expected to incorporate the quality principles into ''pre-dissemination review'' to prevent the dissemination of information that did not meet IQA standards in the first instance.
- OMB established an ongoing role for itself to assure agency compliance with the IQA and to report publicly on the law's implementation.

## Impact of the Information Quality Act

Since the IQA framework has been in place for only a few years, it is somewhat premature to draw firm conclusions about the statute's impact. Nonetheless, several public reports have analyzed the law's impact, drawing very different conclusions.

In reporting on the first year of the IQA's implementation, OMB has presented a positive picture of how the correction process has led to targeted changes in disseminated information without major disruptions of agencies.[6] The conclusions of the OMB report were challenged vigorously. In particular, OMB Watch issued a report disagreeing with each of OMB's findings.[7] The OMB Watch report challenged some of the most basic facts in the OMB document[8] as well as the broader conclusions.[9]

The IQA has also been criticized in newspaper articles where it has been characterized as a ''cudgel to beat back regulation.''[10] Public interests groups have criticized the IQA as an effort ''to suppress information from government dissemination'' (Public Citizen), indicating that ''it could ultimately lead to less action by government'' (OMB Watch).[11]

The Center for Progressive Regulation (CPR), a frequent critic of agency actions under the IQA, has characterized OMB's data quality initiative as a form of ''death by data quality'' for health and safety regulations and ''an attempt to censor government or other public research that threatens powerful economic interests.''[12] CPR has challenged individual IQA petitions as efforts to prejudice ''poor, minority communities already subjected to decades of health risks'' or as ''nothing less than an all-encompassing, new layer of review for every pending federal and state rule.''[13]

These are strong critiques for a statute that, on its face, merely requires agencies to adhere to principles that few would dispute.[14] The concept that agencies should focus on the accuracy and proper explanation of information placed on a Website, an inherently global information source, is not a particularly new value. Most agencies accept the principle and feel that they are already meeting that goal.

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[3] While the IQA is not an amendment to the PRA, it instructs OMB to issue its guidelines ''under'' the rulemaking authority of the PRA and ''in fulfillment of [its] purposes and provisions.'' The IQA is codified as a footnote under the PRA's rulemaking section. 44 U.S.C. § 3516.

[4] For example, the legislative history of the Fiscal Year 1999 Omnibus Appropriations Act (Pub. L. No. 105-277) included statements, in House Report 105-592, on this subject.

[5] 67 FED. REG. 8452 (Feb. 22, 2002).

[6] OMB, *Information Quality: A Report to Congress for Fiscal Year 2003* (Apr. 30, 2004).

[7] OMB Watch, *The Reality of Data Quality Act's First Year: a Correction of OMB's Report to Congress* (July 2004) (''OMB Watch Report'').

[8] OMB indicated that 35 correction requests had been filed; OMB Watch indicates that 98 substantive IQA petitions have been filed. OMB Watch Report, at 5.

[9] OMB Watch's primary critique is that OMB did not provide specific evidence to support its view that the IQA has not had a chilling effect on the pace of information dissemination by federal agencies. OMB Watch also expresses the opinion that the IQA has been a contributing factor to a general slowdown in federal regulatory activity, although it did not offer specific quantitative data supporting that point. OMB Watch Report, at 8 & 10.

[10] Rick Weiss, *'Data Quality' Law is Nemesis of Regulation*, WASHINGTON POST, Aug. 16, 2004, at A1.

[11] Comments cited in Stephanie Horvath, *Raids on Regulations Expected*, WALL STREET JOURNAL, July 5, 2002, at A14.

[12] *See* Center for Progressive Regulation comments on OMB's Draft Data Quality Guidelines (May 31, 2002); John Applegate et al., *Data Quality or Scientific Censorship?*, RISK POLICY REPORT (October 2004).

[13] *See* Letter from CPR to Michael O. Leavitt, EPA Administrator (January 14, 2005) (concerning the Proposal of Devil's Swamp Lake to the National Priority List); Letter from CPR to Michael O. Leavitt, EPA Administrator (August 3, 2004) (concerning State Rules regarding Volatile Organic Compounds in Paint).

[14] *See* Curtis Copeland & Michael Simpson, *The Information Quality Act: OMB's Guidance and Initial Implementation*, CRS Report for Congress (Sept. 17, 2004) (''CRS Report'') (providing a more neutral summary of the issues surrounding the IQA).

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The available evidence does not suggest that the IQA is leading to profound changes in how agencies conduct their regulatory or information dissemination activities. While there is some debate about the specific number of substantive IQA correction petitions that have been filed, all parties seem to agree that fewer than 100 petitions were filed in FY 2003.[15]

To put that number in context, during that same year federal agencies received thousands of Freedom of Information Act (FOIA) requests for processing under a procedural regime very similar to the IQA process. For example, the Department of Transportation (DOT) received 10,649 requests, EPA received 12,787 requests, the Department of Defense (DOD) received 74,399 requests, and the Department of Health and Human Services (HHS) received 146,257 requests.[16]

To the extent that correction requests might be seen as an avenue for launching attacks on ongoing rulemakings, widespread use of the IQA for that purpose is not evident at this time. Looking at the overall numbers, the Regulatory Information Service Center (RISC) in the General Services Administration, which compiles and reports the Unified Agenda of Federal Regulatory and Deregulatory Actions, reports that the Agenda generally includes, in any given year, over 1300 planned proposed regulatory actions and a slightly higher number of planned final regulatory actions.[17] As indicated earlier, fewer than 100 IQA correction requests were filed with agencies in FY 2003.

A closer look at available data, at an agency level, portrays a mixed picture of how the IQA is being used by the public. Since critics of the IQA have expressed concern about its potential impact on health and environmental regulations, it is worth examining the experience at three agencies – HHS, EPA and the Fish and Wildlife Service. Since 2003, these agencies account for 58 of the IQA correction requests that have been filed.[18]

A common charge against the IQA is that it is primarily a tool used by industry. Certainly most of the correction requests at these agencies (34) have been filed by industry. Other categories of submitters have been significant, however, including private citizens (11), public interest groups (8) and government, including members of Congress as well as state and federal agencies (5).

Another concern expressed is that the IQA will be used primarily to attack regulations. Using a broad definition of ''regulatory action'', to include such matters as cancer assessments by the National Toxicology Program and models of panther populations used for designating critical habitats, just over half (30) of the requests have involved regulatory matters. Thus, many of the petitions have involved more general forms of public communications on Websites and in documents.

Critics of the IQA have also expressed concern that correction requests, which must be responded to within certain deadlines, would divert agencies from important agency business, such as work on regulations. The available evidence, however, suggest that agencies have been able to manage the workload on these requests through frequent use of ''interim responses'' that defer action on correction requests. For example, HHS has issued interim responses for 13 of its 21 requests, and EPA has issued interim responses for 15 of its 26 requests.

Perhaps the most important statistic is how often a correction petition has actually led to a correction of some kind. As of early February 2005, no request was granted in its entirety and only 13 requests led to some form of modification to a document or Website. The most common action, denial of the request, occurred in 23 situations. For 10 requests, the agencies deferred action until a later proceeding, typically involving a rulemaking, an adjudication or a pending report. The remaining 12 requests are still pending at the three agencies.

Presumably IQA correction requests are having some effect on individual projects. The available evidence, however, does not suggest that the IQA has caused a profound change in how agencies are using and disseminating information as a more general matter.

Some observers believe, however, that the IQA's true impact will not be apparent until the courts reach a conclusion about whether agency decisions under the IQA can be the subject of judicial review.[19] To date, two district courts have considered whether agency information disseminations allegedly in violation of the IQA are subject to judicial review.[20] Both courts declined to undertake such review.

By conventional measures, then, the IQA does not appear to present a substantial threat to agency operations. Its provisions have been invoked infrequently. Agencies have been able to manage the workload involved. Less than a quarter of the petitions filed with the agencies considered above have resulted in any change to existing information. The courts have not yet found agency actions on these petitions judicially reviewable.

Yet concerns about the statute's impact persist. In light of the public policy disputes discussed below, it seems clear that these concerns are fundamentally about what the IQA *might* be used for and the motives of the law's advocates.

## The Role of Regulation, Science, and Information in Public Policy

To understand the current controversy over the IQA, it is important to appreciate longer term trends in how

[15] *See supra* note 8. These numbers do not include a large number of routine requests for information correction that agencies have made in the past but that are now being presented through the IQA correction process. For example, the Federal Emergency Management Agency (FEMA) receives annually tens of thousands of requests to correct maps used in the national flood insurance program. While these requests are now being processed as IQA correction requests, they do not represent significant new burdens for FEMA.

[16] *See* DOT FOIA Report (2003), *at* http://www.dot.gov/foia/reports/2003annualreport.html; EPA Annual FOIA Report (2003), *at* http://www.epa.gov/foia/docs/2003report.pdf; DOD FOIA Program Report (2003), at http://www.defenselink.mil/pubs/foi/FY2003report.pdf; HHS FOIA Annual Report (2003), *at* http://www.hhs.gov/foia/03anlrpt.html.

[17] Personal communication with David Pritzker, RISC (October 2004).

[18] To their credit, these agencies maintain Websites containing the correction requests that have been filed, as well as their correspondence with the submitters.

[19] *See* CRS Report, at 14 (summarizing perspectives on this issue).

[20] *In re: Operation of the Missouri River Sys. Litig.*, No. 03-MD-1555, 2004 WL 1402563, at *29 (D. Minn. June 21, 2004), and *Salt Institute v. Thompson,* 345 F. Supp. 2d 589 (E.D. Va. Nov.15, 2004).

government, particularly at the federal level, is developing and implementing health and environmental policy. These trends have created uncertainties that breed anxiety among all parties.

Gone are the days when federal policy was made primarily by Congressional legislation and broad-based EPA regulations. In the modern world, EPA uses a wide array of non-regulatory tools to influence behavior. While regulations continue to dictate what regulated entities do to a significant degree, the Agency also issues guidance documents, publishes scientific assessments and disseminates environmental data. These non-regulatory actions, particularly when amplified by the power of the Internet, can have impacts as profound as any legal mandate.

In addition, EPA is no longer the dominant decisionmaker defining environmental requirements and policies. In today's world, EPA tends to share that responsibility with a variety of other agencies, from the Centers for Disease Control and Prevention to the Department of Homeland Security. State and local governments also have an increasing role in establishing policies, in contrast to implementing federal requirements. Forces as diverse as European Union directives and domestic toxic tort litigation also influence behavior.

These trends create great uncertainty about how the worlds of regulation, science and information policy should interact to establish a reasonable agenda for responsible environmental stewardship. Various parties with views on what the agenda should be now have multiple pathways to pursue their positions. By the same token, this multivariate process means that it is difficult to predict how policies will be developed and implemented.

Several of these trends bear directly on the meaning of ''information quality,'' and thus define the political context in which the IQA has been received and perceived. These trends include at least the following:

- Public interest groups have decried, for some time, what they see as the ''ossification'' of the federal rulemaking process that discourages the imposition of regulations.[21] This concern has been exacerbated by the proliferation of requirements for certifications, impact assessments and findings, imposed by statute and Executive Order, that now accompany most significant rules.[22] Those concerned about this issue see the IQA as an attempt to further slow the rulemaking process and to ''ossify'' the disclosure of public information by government agencies.[23]
- While governments have long been providers of information to the public, agencies are now more consciously using information disclosure, as opposed to regulation *per se*, to influence behavior.[24] This trend at EPA is often linked to the development of the Toxic Release Inventory program under the Emergency Planning and Community Right to Know Act, but several scholars have noted that the inclination to employ ''transparency systems'' to address social problems is a widespread feature of American politics.[25] Public interest groups are strong supporters of these ''right to know'' programs. Such programs, however, often generate anxiety among the companies whose products and businesses are the subject of disclosure because the public can easily misinterpret complex data, and because there is little recourse to correct misinterpretations if they occur. One group's ''right to know'' is another group's ''regulation by information.''[26]
- Improvements in health and environmental science, as well as high-speed computing, have greatly accelerated the use of models as tools for making policy decisions. In some cases, models have appeared to replace human judgment on critical matters of health hazard and exposure, environmental fate and transport, or social and economic impacts. Yet each model contains value or policy judgments reflected in its choices of assumptions and algorithms. Beginning in the 1990's, EPA undertook a series of policy and organizational reforms aimed at rationalizing its approach to environmental modeling.[27] Recognizing the power of models in setting regulatory policy,

[21] *See* Thomas O. McGarrity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L. J. 1385 (1992); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 49 (1993); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013 (2000). The phrase ''ossification of rulemaking'' has been attributed to remarks by E. Donald Elliott delivered at symposium on Assessing the Environmental Protection Agency After Twenty Years: Law, Politics and Economics, at Duke University Law School (November 15, 1990). *But see* Cary Coglianese, *The Impact of Judicial Review on Regulatory Policy: Reexamining NHTSA's Rulemaking Retreat*, *available at* http://groups.haas.berkeley.edu/imio/coglianese 040104.pdf.

[22] Federal agencies must now certify that a rule will not violate the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Act, the National Technology Transfer and Advancement Act, the Congressional Review Act and a series of Executive Orders addressing topics such as federalism, tribal governments, children's health, energy supply distribution and environmental justice.

[23] *See* a representative perspective from the Center for Progressive Regulation at http://www.progressiveregulation.org/perspectives/dataQuality.cfm on the World Wide Web.

[24] In the mid-1990's, for example, EPA published the following statement:

> EPA does not produce widgets, maintain parks, or fight wars. EPA's products are information-based products, whether they be rules, environmental education, new science, or enforcement actions. . . . Information that is cared for as an asset, that is treated as a trust for all staff, EPA's partners and the public, is the ultimate weapon in EPA's mission to protect the environment.

U.S. EPA, *Providing Information to Decision Makers to Protect Human Health and the Environment: Information Resources Management Strategic Plan,* EPA Pub. No. 220-B-95-002 at 30 (April 1995).

[25] A series of papers developed by the Transparency Policy Project at Harvard's John F. Kennedy School of Government provides a useful summary and analysis of ''transparency systems'' in the U.S. *See* Mary Graham, *Information as Risk Regulation: Lessons from Experience*, Regulatory Policy Program Working Paper RPP-2001-04, John F. Kennedy School of Government, Harvard University (2001); Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Sustainable*?, John F. Kennedy School of Government, Harvard University, OPS-02-03 (2002); Archon Fung, et al., *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* John F. Kennedy School of Government, Harvard University OP-03-04 (Dec. 2004).

[26] *See* the Center for Regulatory Effectiveness for a summary of one industry advocacy group's perspective on ''regulation by information'' at http://www.thecre.com/information/index.html on the World Wide Web.

[27] In response to recommendations from its own Science Advisory Board in 1989, EPA undertook analyses and public meetings to consider how to improve the consistency and quality of modeling activities used to set policy. EPA now has a set of guidance documents and an organizational structure, referred to as the Council for Regulatory Environmental Modeling (CREM), to effectuate that goal. CREM maintains a Web-

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interest groups are now calling for greater transparency and validation of Agency models, as well as accountability for the value judgments buried in these models. The design and use of models is now a primary battleground of environmental policy.

- Parties interested in regulatory decisions have become more skeptical about the scientific underpinnings for those decisions. They are demanding clearer, comprehensive explanations of the bases for such decisions, as well as greater access to the raw data supporting individual studies.[28] While this desire for transparency and access to the data underlying influential science is understandable, strong forces frustrate that result. In some cases, the supporters and funders of research might want control of who has access to the data, for either economic or ethical reasons. The researchers themselves might resist public access to their information, influenced by their desire to obtain credit for their work through publication in scientific journals. In some cases, traditional peer review practices discourage public disclosure of debates among scientists.[29]
- U.S. policy on public disclosure of information has been profoundly affected by the threat of terrorism. At least since the 1940's, the trend in federal policy has been to make governmental decision processes more transparent, as evidenced by the APA, FOIA and various ''sunshine'' laws. That trend is no longer inevitable. Even prior to the 9/11 attack, political leaders were beginning to express concern about the threat of cyber-attacks, questioning the wisdom of open information channels within the government.[30] In the wake of the 9/11 attacks, agencies shuttered several Websites and have been more circumspect about providing certain kinds of information to the general public. Public interest groups have expressed deep concern about the government's current inclination to limit the availability of information. Accordingly, they are wary of any new policy that might have a chilling effect on public access to information.[31]

These trends profoundly change the way policy is made and how government agencies influence the regulated community's behavior. Traditional boundaries between the worlds of regulation, science, and information disclosure have become blurred. In a sense, the ''regulatory'' process now begins well before a proposed rule is even drafted. Debates about scientific assessments and information products offered to the public have become as intense as any dispute found in conventional rulemaking proceedings.

For the participants in policy development, both inside and outside the government, this changing landscape breeds unpredictability. It is easy to miss important developments and equally possible to over-react to events of marginal significance.

With its enactment in 2000, the IQA set sail on a turbulent sea. It was a statute with a minimal pedigree and thus little political consensus about its role and its limits. Its nominal scope (i.e, all information dissemination) and its goals (i.e., objectivity, utility, integrity) were broadly stated. Yet the statute did not define the appropriate remedies for an ''information quality'' problem, leaving that complex set of question to later development. OMB took seriously the task of defining the meaning of ''quality'' under the IQA in developing its Guidelines, which naturally led the debate into controversial areas of science, such as peer review and risk communication.

The IQA's advocates offered sweeping predictions about the statute's ability to reshape science and regulatory policy. Some NGO groups began to perceive the IQA as a pro-industry weapon intended to provide a new avenue for undermining health and safety protections. Instead of using the statute's provisions to challenge information they believed to be flawed, these groups decided to oppose further developments of the principles of ''information quality'' and seek repeal of the statute.

In the context of the trends discussed above, the hyperbole surrounding the IQA is at least understandable. Unfortunately, this situation has led to a poor ''quality'' discussion of an information quality statute. It is time to take a more measured, objective look at the statute to assess its potential contribution to public discourse and decisionmaking while appreciating its inherent limits.

## Proper Role of the Information Quality Act

The IQA can be a useful tool to improve the transparency and accountability of government. It can also help focus governmental attention on delivering information to the public that is easy to use and understand. These are goals that serve all interests.

To achieve these goals, it is essential to define the role of the IQA precisely. The statute is concerned with the responsible dissemination of good quality information. It does not drive regulatory decisions. It also does not define ''acceptable'' science for public policy. The IQA can be used to correct factual errors and to force better explanations of the judgments made by government, including those made in regulatory and scientific contexts. The IQA does not, however, provide a basis to overturn policy decisions in areas of agency discretion. Other statutes would have to provide the basis for such challenges.

It is helpful to place the IQA in the context of other federal laws addressing information management issues. Traditionally, federal statutes in the information field have addressed the following matters:

- *Public disclosure and access to information* – The APA and FOIA are primary examples of this type of law.

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site that contains a library of over 100 models used in EPA's regulatory programs. *See* http://cfpub.epa.gov/crem/.

[28] Perhaps the most significant example of this trend at EPA was the controversy in the late 1990's over the Harvard Six Cities Study and the American Cancer Society Study, which played a substantial role in EPA's decision to tighten the Clean Air Act ambient standards for particulates. This controversy has often been cited as the impetus for passage of the ''Shelby Amendment'' that provides greater public access to data generated in a government-funded study at a research institution. Another example of this trend is the frequent calls for public disclosure of clinical trial results that are generated in the new drug approval process at the Food and Drug Administration.

[29] As an example, the National Academy of Sciences (NAS) filed strong comments in opposition to the transparency provisions that OMB included in its proposed Information Quality Bulletin for Peer Review. In the final version of the Bulletin issued on December 17, 2004, OMB acquiesced to these comments by providing NAS with a broadly drawn exemption from the Bulletin.

[30] Steven A. Hildreth, *Report to Congress: Cyberwarfare*, CRS Report (June 19, 2001). *See* Joshua Green, *The Myth of Cyberterrorism*, WASHINGTON MONTHLY, Nov. 2002 (contrasting view of the seriousness of this threat).

[31] *See* OMB Watch for a summary of the perspective of nongovernmental organizations, and the government actions that have prompted these concerns, at http://www.ombwatch.org/info on the World Wide Web.

- *Reporting/recordkeeping/records management* – Some statutory provisions in this area are exclusively concerned with internal governmental operations. Other statutes, such as the PRA, also seek to manage the burden placed on the private sector by governmental reporting and recordkeeping obligations.
- *''Good Practice'' obligations for agencies* – A variety of federal statutes require agencies to adopt exemplary management, planning and budgeting practices related to information activities. In some cases, parties outside the government are the implied beneficiaries of these practices. For example, the PRA requires agencies to provide for public access to information, protect privacy and ''improve the integrity, quality and utility of information to all users within and outside the agency.''
- *Protections of trade secrets, privacy and certain sensitive information* – Several statutes require agencies to maintain the confidentiality of specified information collected from the private sector for ethical, business and security purposes.
- *E-Government* – Recent statutes require agencies to modify their operations to accommodate or promote electronic reporting and Web-based access to governmental information.
- *Required consideration of certain values* – There are a variety of statutes, which could be considered ''information'' laws, that require agencies to consider certain values or impacts when they make decisions under their organic laws. Examples of this kind of statute would be the National Environmental Policy Act (environmental impact) or the Regulatory Flexibility Act (impact on small business).

The IQA builds on these existing laws on federal information management in several ways. The statute requires the government to embrace ''information quality'' as a value to guide its information dissemination activity. At the same time, the statute does not require agencies to supply an ''impact statement'' to demonstrate compliance.

As amplified in the OMB Guidance, the principles of ''information quality'' require agencies to disseminate information that is factually accurate and that offers a balanced, or ''objective'', explanation of events, conditions or circumstances. Both the ''objectivity'' and ''utility'' standards call on agencies to provide understandable communications with the audiences for governmental information, including the general public. This duty requires agencies to provide ''context'' for complex data, including the inherent limits of the available information. Providing context also requires fair consideration and communication of all relevant information, including contradictory information (e.g., scientific studies reaching different results.)

The ultimate test of whether agencies are meeting these expectations is the relative transparency and coherence of government information to parties outside the government. The concept of transparency here is not measured solely by access to government documents, as it might be for FOIA. The IQA focuses additionally on presentation of the *rationale* for a particular assessment or conclusion embodied in the information in question. For example, the OMB Guidelines stipulate that scientific and technical analysis should be ''reproducible'', in the sense that there is a sufficient explanation of a methodology to allow another scientist to replicate the analysis.

Ultimately, agency success under the IQA is measured by public understanding of the information that is conveyed. If the government's presentation gives a misleading message or if the user of that information misunderstands its meaning, then IQA compliance is at issue.

This central role of the public is one of the distinguishing features of the IQA. When the customers for government information are dissatisfied, a *procedural* solution is provided to address these concerns. The statute and existing agency guidelines allow interested parties to file requests for correction of specific information. By this mechanism, the IQA recognizes a public right to good quality information and defines a clear role that interested parties can play in the implementation of the law. This aspect of the IQA contrasts with more traditional information management statutes that tend to impose general duties on government agencies as a way to achieve better information management.

## Defining Appropriate Remedies

Any broad characterization of the IQA's role, including the ones provided in this paper, cannot be fully understood without a consideration of the appropriate remedies that follow from the Act's provisions. Many correction requests filed to date have not defined the requested remedy very precisely, or they have included an unrealistic request (e.g., withdraw a regulation.) This uncertainty about appropriate remedies under the IQA has contributed to some of the mistrust that has built up around the law.

While some of this uncertainty may be inevitable given the novelty of the IQA, certain correction request scenarios are amenable to straightforward solutions. In the following situations, an ''informational remedy'' can be clearly defined:

- *Factual inaccuracy* – When a fact is incorrect (e.g., a company is listed as owner of a facility it never owned), an agency can make a simple correction. The only question that arises is whether the correction request mechanism of the IQA is necessary for such a situation. For example, EPA has received 26 distinct IQA correction requests since its Information Quality Guidelines became effective. During that same time period, EPA was receiving 15 error correction requests per day under its Error Tracker System, which responds to factual correction requests in popular Agency Websites like Envirofacts and Enforcement & Compliance History Online (ECHO).[32] This Error Tracker System appears to be the mechanism of choice for addressing factual errors.
- *Unexplained assumption or methodology* – Agencies can simply provide this information, which they should possess. They should do so in a way that will help users understand the meaning of the disseminated information.
- *Undisclosed information* - Undisclosed information should be provided or the Agency should explain why it is not available. In the case where the information sought is contained in a discrete document, it may be more appropriate to obtain this information through a FOIA request.
- *Discussion of contradictory information* – An agency should provide information that may reflect a differing viewpoint than the one adopted by the agency. Acknowledgement of differing points of view is an important part of providing the public with good contextual information.

[32] Personal communication with Pat Garvey, EPA (November 4, 2004).

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An agency should also explain why it disagrees with the judgments of other parties.

- *Misleading impressions* – A common critique of an agency's information dissemination is that it presents a misleading impression or unwarranted conclusion. Agencies can respond appropriately to these situations by providing more thorough explanations, adding necessary caveats, or providing background information about the limitations of particular data sets.
- *Inconsistent information* – In some cases, agencies may take apparently contradictory positions in separate information disseminations. As an example, EPA has recently issued an initial decision on a correction request that cited inconsistencies in the selection of parameters for models used in different Agency programs.[33] Where inconsistencies exist, an agency should correct the information to make it consistent or provide an explanation for why disparate positions in differing disseminations are warranted by the facts.
- *Information not evaluated* – The information should be evaluated and its importance explained. If an agency does not see the cited information as relevant to the issue at hand, an explanation should be provided.

In contrast, other types of remedies must find their primary rationale outside of the IQA. In particular, the IQA does not, by itself, provide the basis for overturning or withdrawing a regulation. Certainly an IQA challenge can lead to a change in information upon which a regulatory decision was based. The question of whether a rule is justified, however, depends upon the legal standards of the organic statute under which it was written and the APA.

The role of the IQA, and thus the nature of an informational remedy, becomes more complex in other areas. For example, an IQA petition could ask EPA to explain the health significance of environmental releases that the Agency reports to the public (e.g., air emissions from destruction of the World Trade Center.) Yet EPA may not be able to provide such an analysis readily.

The nature of an agency's IQA responsibility will necessarily depend on the message it intends to convey. In the example above, if EPA expresses the view, directly or implicitly, that particular environmental releases do or do not present a health threat, then the Agency would have a responsibility to explain the basis for such a conclusion. On the other hand, if the Agency only intends to provide access to monitoring data, without drawing any conclusions or making recommendations, then the IQA responsibility would focus more on explaining the origins of the information and its limits for addressing particular questions. While it is perhaps self-evident that IQA responsibilities and remedies must reflect an agency's intended public message, defining appropriate remedies in the context of particular situations will require careful consideration.

The applicability of the IQA to scientific assessments also raises important questions about appropriate informational remedies. Scientific conclusions can run a gamut from straightforward, almost mechanical, calculations drawn from hard data to more qualitative judgments that require weighing of multiple pieces of evidence.

Where scientific assessments involve mechanical calculations, using standard methods and protocols, such assessments can be challenged under the IQA just like any factual statement. In these cases, the remedy is fairly clear – the agency needs to make the proper calculation.

In the situation where agencies are weighing multiple pieces of scientific evidence, the IQA requires, at a minimum, a cogent explanation of how an agency evaluated all of the available, relevant scientific data and reached its conclusions. For ''influential'' analyses of risk, where the OMB Guidelines incorporate the standards of the Safe Drinking Water Act, the agency would also be expected to use the ''best available, peer-reviewed science'' as well as data collected by ''accepted'' or ''best available'' methods.

If a scientific assessment is deficient in this regard, the appropriate IQA remedy depends on the nature of the deficiency. For example, if a scientific assessment ignores a relevant, peer-reviewed study that does not support the conclusions reached in the assessment, the agency should either modify the assessment to reflect the study or explain why the study does not justify a change in the assessment. While agencies can expect deference to their judgments when science is uncertain, such deference is not unlimited. If an agency's scientific conclusion does not reasonably follow from the available high-quality data, then the conclusion itself may violate the IQA. Over time agencies, and perhaps the courts, will need to define what the appropriate remedy should be when a scientific conclusion is challenged.

Hopefully, further experience will refine some of these questions and lead to more clarity on the role of the IQA. In all such refinements of the law's scope, it remains important to focus on the remedy issue. Until all parties understand the nature of an informational remedy for an alleged violation of the IQA, substantial confusion will remain about the legal and policy interface among regulation, science and information.

As a final note on the question of appropriate remedy, it is difficult to decide when information should be withdrawn from the public domain. This issue is an important one because several IQA correction requests have sought removal of information from an agency's Website. As suggested above, the most common forms of IQA remedies involve the addition of further information to the information dissemination. As a result, closing a Website is rarely warranted.

There may be cases, however, where closure of a Website or withdrawal of a document is the appropriate remedy. First, there may be times when the ''integrity'' of a Website is compromised and site closure is appropriate. The IQA concept of ''integrity'' involves protection of information against ''unauthorized access or revision,'' a scenario that comes up most often with Websites that might be vulnerable to hacking.[34]

[33] Request for Correction (RFC) filed by the U.S. Chamber of Commerce (May 26, 2004). EPA's initial response to this RFC is dated January 12, 2005. The Chamber's petition had documented that EPA had set different values for the chemical/physical properties (e.g., Henry's Law Constant) of distinct chemicals in different databases. At this time, the Chamber has not filed a Request for Reconsideration of EPA's decision.

[34] On only one occasion has EPA shut down its entire Website. In 2000 EPA closed its Website in response to a Congressional request and a General Accounting Office (GAO) report documenting multiple examples in which EPA's computer security had been breached by outside parties. *See* GAO, *Information Security: Fundamental Weaknesses Place EPA Data and Operations at Risk*, GAO/AIMD-00-215 (July 2000); Letter

Second, one or more errors that pervade an entire database may so undermine the validity of the data that the information should be withdrawn. Third, if an agency is unwilling or unable to make the changes that are needed to correct an IQA problem, then withdrawing the information may be necessary as a last resort.

## The Question of Judicial Review

One of the most hotly debated questions surrounding the IQA is whether an agency response to a correction request can be the subject of judicial review. The battle lines have been drawn along two closely related dimensions, at a policy level and a behavioral level.

At a policy level, those who favor judicial review believe that agencies should be accountable for correcting errors and misleading statements expeditiously. The IQA establishes a procedural mechanism that both allows agencies to fix mistakes and provides courts with an administrative record to review if the agency fails to respond properly. This school of thought notes the specific language of the IQA (which requires a mechanism allowing affected persons ''to seek and obtain correction'' of information not meeting applicable quality standards), as well as the general presumption in the APA in favor of judicial review of agency action.

At a behavioral level, supporters of judicial review are concerned that agency personnel will not take the IQA seriously without judicial oversight. This concern does not assume that government employees want to disseminate inaccurate information, but rather that they must set priorities among competing time demands and thus will give lesser consideration to legal mandates that carry no consequences if violated.

Opponents of judicial review under the IQA see that prospect as an opportunity for private interests to create an ongoing right to interfere with government action and stall the pursuit of important public objectives. They also contend that the IQA standards are too vague to provide tangible benchmarks of governmental responsibility, inviting judicial intervention into matters that should remain discretionary with administrative agencies.

Moreover, they fear that the prospect of judicial review under the IQA will make agency employees more reluctant to disseminate information that might face industry challenges on quality grounds. The result that they fear is a chilling effect on public access to information. In addition, governmental managers want to avoid the resource demands of potential litigation.

While the courts have not addressed these concerns directly, two courts have decided that an alleged failure to comply with the IQA is not amenable to judicial review. In *In re: Operation of the Missouri River System Litigation*[35], the Federal District Court of Minnesota considered a variety of challenges, by multiple parties, to the U.S. Army Corps of Engineers' ''Missouri River Main Stem Reservoir System Master Water Control Manual,'' which determined how the Corps would allocate water to various interests in the water basin. One party claimed that the Corps violated the IQA because it did not respond to a request for ''information and science'' on one aspect of its water allocation plan.

from Congressman Tom Bliley and Congressman Fred Upton to Carol M. Browner, EPA Administrator (Feb. 15, 2000).

[35] 2004 WL 1402563, at *24.

The court noted that the IQA does not explicitly authorize judicial review. More importantly, it concluded that there also is no APA review of an alleged violation of the IQA. Based on minimal analysis, the court concluded that neither the IQA itself nor its legislative history provided sufficient guidance on the meaning of the key terms in the statute. The court concluded that there was ''no law to apply'' and thus the agency action (i.e., dissemination of information) was committed to agency discretion.[36]

The second recent court opinion on this topic, *Salt Institute, et al. v. Tommy Thompson*[37], provides a bit more analysis of the legal issues involved in judicial review. The District Court for the Eastern District of Virginia endorsed the conclusion of the *Missouri River* case that terms used in the IQA are too vague to be ''judicially manageable.'' In reaching that conclusion, it emphasized language in the OMB Guidelines saying that agencies ''are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved.''[38]

In addition, the court also concluded that the reports and Website information at issue in the case did not qualify as ''final agency action'' under the APA. This conclusion was based on a set of cases holding that a final agency action is ''one by which rights or obligations have been determined, or from which legal consequences will flow.'' *Bennett v. Spear*, 44 ERC 1161, 520 U.S. 154, 178 (1997).[39] The court then concluded that the information about dietary sodium intake disseminated by the Department of Health and Human Services had no legal impact and thus would not be an agency action.

While these cases are important initial signals about how the courts will react to claims for judicial review on IQA issues, they probably do not constitute the definitive precedents that will guide all future cases. In particular, these opinions do not grapple directly with important arguments that are likely to arise. Future cases are likely to consider the following lines of argument:

**1. The IQA and the OMB Guidelines provide adequate standards for review.**

The APA establishes a general presumption in favor of judicial review, and thus the ''committed to agency discretion'' exemption has been narrowly construed by the courts. Generally the conclusion that there is ''no law to apply'' must be quite clear.

In the following cases cited in the *Salt Institute* opinion, the absence of judicially manageable standards was fairly clear. In *Steenholdt v. FAA*, 314 F.3d 633 (D.C. Cir. 2003), the petitioner sought review of a delegation to private individuals to conduct aircraft inspections. The court easily determined that there was no law to apply because the FAA had authority to terminate the

[36] The opinion does not indicate that the party bringing the challenge had filed a correction request with the Corps prior to bringing the challenge to court. The failure to file such an administrative claim prior to seeking judicial review is another likely infirmity of the plaintiffs' case.

[37] 345 F. Supp. 2d at 601.

[38] 67 FED. REG. at 8458.

[39] *See also, Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852 (4th Cir. 2002); and *Industrial Safety Equip. Ass'n Inc. v. EPA*, 837 F.2d 1115 (D.C. Cir. 1988).

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delegation ''at any time for any reason.'' In *Heckler v. Chaney*, 470 U.S. 821 (1984), the petitioner was trying to force the Food and Drug Administration to take an enforcement action, raising the issue of ''prosecutorial discretion'' for administrative agencies that courts are disinclined to review.

In contrast, the standards of the IQA, particularly when the specific provisions of the OMB Guidelines are considered, have more substance.[40] Certainly, they are comparable to standards used in many regulatory programs. Even the section of the OMB Guidelines quoted by the court – that agencies should undertake the ''degree of correction that they conclude is appropriate for the nature and timeliness of the information involved'' – also states that each agency must have ''specific standards of quality that are appropriate for the various categories of information they disseminate.''[41]

**2. The IQA establishes a new regime defining information dissemination as agency action**

The courts have not yet addressed a key argument presented by the plaintiffs in the *Salt Institute* case – that the IQA changed prior law. The cases cited in the courts' opinions pre-date the OMB and agency guidelines.

The plaintiffs in the *Salt Institute* case emphasized that Congress had established in the IQA a new set of standards for ''information disseminations'' and a procedural mechanism for implementing those standards. More specifically, they argued that HHS's correction process led to a formal denial of the Salt Institute's petition and that the Department's decision to deny the petition was an ''order'' arising in an informal adjudication created by statute. Such orders would typically be reviewable agency action, even if the original dissemination might not be.

HHS argued that the Salt Institute cannot ''create'' a final agency action simply by filing a petition on a subject (i.e., dissemination of the original information) and then challenging the denial of the petition. The *Salt Institute* court did not address these arguments, and they are sure to be considered by future courts.

**3. Analogy to ''Reverse FOIA'' Cases**

No court has yet considered what might be an important precedent for judicial review of IQA disputes – the so-called ''reverse-FOIA'' cases. FOIA expressly authorizes private parties to seek judicial review of an agency decision to *withhold* information. In some cases, however, parties may want to *prevent* disclosure of confidential or sensitive information that an agency may plan to disclose. The FOIA statute does not address that situation.

The courts have recognized, however, that parties may go to court to prevent disclosure of information – a ''reverse FOIA'' case – by filing an action under the APA. As recognized in the seminal Supreme Court case *Chrysler v. Brown*, 441 U.S. 281 (1979), a ''reverse-FOIA'' case is less about FOIA than it is about some other legal obligation that constrains the government's behavior. In the *Chrysler* case, the petitioners argued that the release of certain labor relations documents constituted a release of confidential information protected by the Trade Secrets Act.[42]

While the Trade Secrets Act also does not provide explicitly for judicial review of government actions, the Supreme Court concluded that APA review was appropriate because a disclosure of information violating the Trade Secrets Act is ''not in accordance with law'' under the APA standard for judicial review. By this logic, statutory obligations placed on government agencies to protect private interests can become the subject of review, even though the particular statute is silent on the availability of review.

By analogy, parties wanting to challenge an ''information dissemination'' by an agency could present their case under the APA, arguing that the IQA is analogous to the Trade Secret Act in the *Chrysler* case. Like the Trade Secrets Act, the IQA imposes substantive duties on agencies that are designed to protect private rights. The IQA correction request provisions reinforce the argument in two ways. First, in requiring that agencies create the correction mechanism, the IQA recognizes that ''interested parties'' have a right to seek and obtain good-quality information. Second, the agency process will generate an administrative record that facilitates judicial review.

The ''reverse-FOIA'' cases present an interesting analogy because they address the same subject matter as the IQA – government information dissemination activities. In the FOIA disputes, parties debate whether a particular piece of information should be disclosed. In the IQA context, parties debate whether a particular piece of information must be corrected to meet standards of quality.

It is notable that the many court decisions that have followed the *Chrysler* precedent have not been concerned about whether the particular information at issue determined legal rights or consequences. As the Supreme Court noted in *Chrysler*:

> The FOIA and other such ''access legislation'' are concerned with *formal agency action* – to what extent can an agency or department or, put differently, the head of an agency or department withhold information contained within the governmental unit's files.[43] (emphasis added)

In fact, most documents that are the subject of FOIA requests do not determine legal rights or consequences. In the ''reverse FOIA'' context, a decision to release or withhold information is an ''agency action'' for purposes of the APA regardless of the legal impact of that information under public law. Thus the ''reverse FOIA'' cases suggest that the *Bennett* precedent is not the exclusive framework for deciding whether an agency decision represents ''agency action'' under the APA.

Over the next several years, the courts will likely consider the three arguments outlined above, as well as other issues, that will determine whether judicial review is available for IQA matters. Hopefully, the courts, the Congress and a larger community of experts will also consider the policy aspects of these questions.

Current law sends confusing, even ironic, signals about the role of courts in reviewing informational disputes that arise in the Internet Age. At times, the courts

[40] *See Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1998) (judicially manageable standards ''may be found in formal and informal policy statements and regulations as well as in statutes.'').

[41] 67 FED. REG. at 8459.

[42] 18 U.S.C. § 1905.

[43] *Chrysler Corp.*, 441 U.S. at 301 n. 29 (emphasis added).

and the Congress seem focused on protecting government agencies from any accountability for the information they disseminate. The *Bennett* line of cases, discussed above, certainly reflects that view. In addition, the Federal Tort Claims Act explicitly insulates agencies from liability for acts of slander, libel or misrepresentation.[44]

At other times, the policies favoring a right of judicial review, such as the *Chrysler* line of cases, take the courts deeply into questions about information management and policy.

The APA itself defines ''agency action'' to include the ''failure to act''[45] and so agency inaction has always been an appropriate subject for judicial review under the statute. Given this scope of judicial review, it would seem logical that a court should view the development of an interactive Website by an agency, complete with a press release and training opportunities for site users, as an agency action subject to judicial review. The apparent position of the government, however, is that such a Website is immune from APA review. The courts have not clearly resolved the question.

Behind these incongruities are two different models for how the government can best serve public needs through disclosure of high-quality information. The first model is based on the premise that the best way to achieve this goal is to give government agencies wide latitude to provide information, with little interference from those who might submit or use the information.

Under this model, the government must be trusted to do its best to provide public access to important information. If public access to information causes harm to private interests, this model generally views the benefits of an unfettered governmental power to disseminate information as outweighing whatever harm may occur. If the harm to private interests becomes too severe, this model would look to the political process, rather than the courts, as the mechanism to make necessary corrections.

The second model is premised on a *right* of data submitters and users to obtain high quality information. This right becomes another aspect of the ''checks and balances'' inherent in the American form of democracy.

This model recognizes that the dissemination of information by governmental agencies is highly influential in our society, in part because of the presumed accuracy of such information in the eyes of the public. To assure that this form of power is not abused, data submitters and users are given rights that can be protected by the courts. The protection of these rights may lead to disputes and even unhelpful disruptions of government operations, but that risk is considered acceptable as a cost of preventing agencies, for whatever reason, from failing to deliver fair and accurate information to the public. This view also presumes that higher quality information, like better reasoned decisionmaking, ultimately will serve the greater good.

## Conclusion

The IQA can be a force for greater transparency and accountability in government. These values, in turn, can improve policy decisions and enhance public understanding of information disseminated by agencies. The IQA and its principles are ultimately neutral; the law can serve the interests of all parties.

For the IQA to succeed, however, the public discourse about the law will need to change. All factions will need to set aside the hyperbole and paranoia that has characterized discussion of the statute to date. What is needed is a fair consideration of the law's role and limits, including the critical issue of what constitutes a ''remedy'' to an IQA problem. The questions surrounding judicial review, whether review is appropriate and under what conditions, will also need to be resolved.

For the longer term, the various branches of government, advocacy groups and scholars need to engage in an honest dialogue about how government can be encouraged to deliver high-quality information to the public. On one end of this debate is an approach that places deep trust in government to meet public informational needs. Under this philosophy, government should be protected from obstacles, challenges and oversight that might impede its efforts. On the other end of the debate is an approach that establishes a citizen ''right'' to high-quality information in the public domain. By protecting this right, through substantive standards and procedures, government is required to do its best.

Undoubtedly, the optimal approach will require a balance between these two perspectives. The time is now for a more thoughtful discussion of what that balance should be. If there was any doubt about the need for such a discussion, the controversy over the IQA has made the case. When a modest sunshine statute articulating easily accepted values gives rise to a storm of polarized perspectives, it is time to take stock of where we are.

[44] 28 U.S.C. § 2680(h).
[45] 5 U.S.C. § 551(13).

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