The Ninth Circuit's IQA Opinion in *Harkonen v. U.S. DOJ* -- The Good, The Bad, and The Ugly

On September 8, 2015, the 9th Circuit issued an opinion in *Harkonen v. U.S. Dept. of Justice and U.S. Office of Mgmt. and Budget* (No. 13-15197, 800 F.3d 1143) in which it held that DOJ news releases are exempt from the IQA because they are not "disseminated." The Circuit panel concluded that it should give deference to DOJ's view of its own IQA regulations as exempting all press releases from the definition of "disseminated" information. This is the latest court decision on the IQA and judicial review.

Although the opinion notably avoided several errors that have infected a number of district court decisions, and it was consistent in some key respects with the D.C. Circuit's opinion in *Prime Time Int'l* (the "good"), it has some serious legal defects, and disturbing implications that go beyond the specific case (the "bad" and the "ugly").

Background

Dr. Harkonen, a biotech CEO, was prosecuted by DOJ for allegedly issuing false and misleading information on the test results of one of his company's developmental drug products in a press release. DOJ obtained a conviction, and then issued a press release describing the grounds for the conviction. Harkonen challenged the accuracy of the DOJ press release pursuant to IQA petition procedures. (The irony should be apparent.)

DOJ rejected the Harkonen IQA administrative petitions solely on the basis that press releases are exempt from the IQA under the DOJ implementing rules and therefore it did not need to address the issue of accuracy raised in the petitions. The DOJ decisions also rejected, without any reasoning, an interpretation of its articulation of the exemption (press releases that inform the public of "information in DOJ") that would have limited the exemption so as to exclude the Harkonen press release.

Dr. Harkonen sought judicial review of the DOJ petition rejection under the final agency action provisions of the Administrative Procedure Act.

The District Court held that judicial review was not available, relying mainly on a single sentence in the Fourth Circuit's opinion in *Salt Institute v Leavitt* stating that the IQA does not provide a right to correction of information.

Dr. Harkonen appealed. He argued that the press release exemption in the DOJ regulations was invalid under a *Chevron* analysis because the IQA and the Paperwork Reduction Act ("PRA") provisions that it incorporated gave OMB primary responsibility for implementation of the information dissemination provisions and stated that those provisions apply to all government disseminations of "public information, regardless of the form or format in which such information is disseminated." (44 U.S.C. §3504(d)(1)) In response, DOJ again placed principal reliance on the *Salt Institute* opinion's purported holding that the IQA does not provide a right to correction that will support judicial review.

CRE, represented by Multinational Legal Services, filed an amicus brief supporting reversal of the District Court's decision. The CRE amicus brief, took a somewhat different tack from Harkonen's brief, and focused on two points: (1) While agreeing with Harkonen's *Chevron* analysis, it provided a detailed analysis of OMB/OIRA's interpretation of the press release exemption in the public record that showed clearly that OMB had issued interpretations of the press release exemption that limited it to press releases that only referred to information that had been otherwise disseminated by the agency. (The DOJ press release could have been interpreted to come within this OMB interpretation in referring to "information in DOJ.") CRE argued that Congress had put OMB, not DOJ, in charge of implementing information dissemination statutory provisions and regulations, and therefore the OMB interpretation was controlling. It also observed that the specific language of DO's regulations regarding IQA exemptions, which were required to be consistent with OMB's regulations, could be interpreted to be consistent with the OMB interpretation of the exemption as more limited than DOJ asserted. (2) It provided a detailed analysis of the *Salt Institute* opinion to show that that the statement regarding lack of a right to correction was intended to apply only to non-governmental study data that the Petitioners were attempting to obtain access to and possible correction of, attempting to use the IQA for that purpose. Alternatively, CRE argued that even if the "no right to correction" sentence in the opinion could be interpreted to apply to dissemination of government information, the statement was not supported by any reasoning or analysis whatever and therefore should be disregarded.

The Circuit Court (with one panel member from the Fourth Circuit) affirmed the District Court's dismissal of the case, but on other grounds.

The "Good"

The Circuit Court opinion does not rely on the *Salt Institute* language that DOJ and the District Court urged as determinative in denying judicial review. The Court cited *Salt Institute,* but only for the proposition that there was no right to correction of information under the common law, and that any remedy would have to be statutory, and Harkonen was relying on the Administrative Procedure Act.

The Court also stated that it was not ruling on "the broad question of whether the IQA confers upon a private individual the right to seek judicial review of the correctness of all information published by the government." Instead, it focused exclusively on whether the exemption of press releases as interpreted by DOJ was justifiable and required dismissal of the case.

The opinion also relied on the holding in *Prime Time Int'l* in the D.C. Circuit that agency interpretation of guidance that has the force of law and is binding and therefore is entitled to deference. The Court thus impliedly agreed with the position that OMB and other agency conforming guidelines are regulations, not simply non-regulatory guidance.

The "Bad"

The opinion makes no mention of section 3504(d)(1) of the PRA, which states that dissemination covers information disseminated to the public "regardless of form or format," even though that provision was a linchpin of Harkonen's *Chevron* argument.

The Circuit asserted that the meaning of "dissemination" was ambiguous and capable of interpretation, and therefore DOJ's interpretation passed step one of the *Chevron* analytical paradigm. The term "dissemination" has been used consistently in the PRA without Congress seeing the need for any explanation of the term. One would think that the meaning of the term "dissemination" is plain. It has consistent dictionary definitions that would encompass press releases. OMB's government-wide regulations define "dissemination," consistent with those dictionary definitions, as meaning simply "information distributed to the public." OMB's regulations exempted press releases as information with "limited distribution" and therefore not within the definition of "dissemination." The reasonableness of this apparent OMB position should have been the focus of the opinion, yet the Court simply asserted that because Congress had not defined "dissemination" the term was open to interpretation by DOJ so as to exclude the DOJ press release. The Court should have simply concluded that Congress did not define the term because its meaning is plain. To interpret press releases as information not "disseminated" to the public is patently irrational. They are the ultimate in dissemination. Most agency information disseminations occur through postings on an agency website; press releases are not only posted on agency websites, they are intended for multiple re-disseminations through press articles and non-governmental websites, thereby typically reaching even more members of the general public than other forms of dissemination.

The Court upheld the DOJ position that the news release exemption in its regulations was a blanket exemption partially by relying on the *Prime Time* holding that the term "dissemination" was subject to OMB interpretation in its IQA regulations. However, the Court did not refer to the OMB regulations' definition of "dissemination" or OMB's subsequent interpretation of the exemption as limited to press releases that refer to information that the agency has disseminated elsewhere.

After relying on *Prime Time* as noted above, the *Harkonen* panel then proceeded to diverge from *Prime Time* by relying on DOJ's interpretation rather than OMB's. In fact, it did not even refer to OMB's interpretation of its regulations, with which DOJ was required to be consistent by section 3506(a)(1)(B).

Moreover, the *Harkonen* court ultimately relied on *Auer* deference to support its upholding of DOJ's interpretation, rather than examining the reasonableness of the interpretation and the apparent conflict with PRA section 3504(d)(1), which not only contains the "regardless of form or format" language, but also gives OMB, not individual agencies, responsibility for implementing and overseeing the information dissemination provisions of the Act. Application of *Auer* deference without any inquiry into the reasonableness of an agency interpretation is controversial, even within the current Supreme Court. (*See, e.g.*, Adler JS, 2013, "Are the Days of *Auer* Deference Numbered?" http://volokh.com/2013/03/20/are-the-days-of-auer-deference-numbered/). In this case, *Auer* deference resulted in a federal agency being allowed effectively to alter a plain dictionary definition that Congress had apparently relied on for many years.

The "Ugly"

A broader implication of *Harkonen* is that DOJ, and perhaps other agencies, are free to disseminate any manner of inaccurate information so long as that information is contained in a press release. Theoretically, other agencies could even adopt an interpretation of their own regulations similar to DOJ's (the majority currently follow the OMB interpretation more explicitly), or, if their exemption language is currently more explicit in following OMB's interpretation, they might even revise that language to make their press release exemption as broad as DOJ contends.

This is not as unlikely as it might seem. OMB/OIRA was a joint defendant with DOJ in *Harkonen*, and therefore was complicit in the DOJ litigation position. OMB could have simply directed DOJ to modify the press release or to litigate only the accuracy of its contents, standing by its interpretation. Although the Administration has professed support for information quality and the IQA, apparently it supports it only to the extent that it cannot be held judicially accountable for non-compliance, and will resist corrections, even if warranted, when a correction might be embarrassing or the factual situation presented is unpalatable or controversial.

Finally, as the Court noted, the press release exemption language was not in OMB's proposed regulations; it appeared for the first time in the final government-wide regulations. This could have raised APA notice-and-comment issues, unless the exemption is interpreted as very limited, as was done by OMB. Although such an issue was not raised in this case, it could be raised in any subsequent litigation in another circuit.

Click here for a copy of the *Harkonen* opinion