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## The Information Quality Act: Holding Federal Agencies Accountable

*The Editor interviews Karl Bourdeau, Beveridge & Diamond, PC, Washington, DC.*

**Editor:** Mr. Bourdeau, would you tell our readers something about your background and professional experience?

**Bourdeau:** I joined Beveridge & Diamond in 1978, straight out of law school. I have practiced environmental law exclusively with the firm since then. My particular interest in environmental law derives from my background in science. In law school, I wanted to work on one of the law journals, and I joined the Harvard Environmental Law Review in its first year. I found the environmental area an interesting blend of law, science, economics and public policy, and when I graduated from law school I headed for Washington, DC. At the time, DC was one of the few places where environmental law was practiced, and Beveridge & Diamond was one of the very best firms engaged in that practice.

**Editor:** Would you describe your practice?

**Bourdeau:** Since 1980, my practice has focused on regulatory and corrective action matters under the Resource Conservation and Recovery Act, RCRA. In addition, I handle a wide range of cases under the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA, which is more widely known as Superfund. I principally represent large multinational corporations from a variety of industrial sectors, as well as trade associations. More recently, I have begun to focus on issues posed by the relatively new federal Information Quality Act, or IQA.

**Editor:** At the beginning of the 21st century, we are fully launched into the information age. Concerning your recent IQA work, would you describe what has led to

a need for legislation-forced information quality?

**Bourdeau:** In recent years, federal agencies have begun to regulate more and more through the issuance and use of informal reports, guidance documents and risk assessments.

These somewhat informal actions often become the basis for formal agency rule-making and other actions with the force of law that can have far-reaching consequences. Prior to the IQA, there was no formal mechanism to compel agencies to correct flawed information that they released "informally" unless agency action determining the rights and obligations of parties was involved. The IQA now gives affected parties the right to seek correction in a timely manner of such information when it does not meet uniform federal quality standards.

**Editor:** The IQA was enacted in December of 2000. Please tell us about the origins of this legislation. Why is it important for federal agencies to substantiate the information they publish?

**Bourdeau:** The Act was part of fiscal year 2001 General Government Appropriations legislation. It consists of only a few paragraphs and has no meaningful legislative history. It reflects, however, a Congressional determination that agencies should be held accountable for the quality, objectivity, utility and integrity of the information they disseminate, given the far-reaching impact of that information on such things as commercial interests, the public's perception of risk, and agency priorities for commitment of their resources.

**Editor:** What does the Act require the



**Karl  
Bourdeau**

**Office of Management and Budget to do?**

**Bourdeau:** The Act required OMB to establish guidelines that provide guidance to federal agencies for ensuring and maximizing – and I emphasize the latter term – the quality of information they disseminate. OMB did so with final guidelines in February 2002. OMB is also obligated to report to Congress annually on the implementation of the IQA with respect to, for example, the number and types of requests for correction received by the agencies and how they have been handled. OMB has embraced its statutory responsibilities in a robust manner and has overseen implementation of the Act rather closely.

**Editor:** And the federal agencies themselves?

**Bourdeau:** Federal agencies are required to adopt guidelines that are consistent with OMB's. Each agency's guidelines must establish a basic standard of quality, incorporate pre-dissemination review practices designed to assure the quality of the information the agency disseminates, and make available administrative mechanisms to enable parties affected by information not meeting federal quality standards to obtain timely correction of that information. Agencies must also report to OMB on their implementation of the Act.

**Editor:** What are the challenges that the agencies face in meeting this mandate?

**Bourdeau:** One of the biggest challenges the agencies face is upgrading their pre-dissemination review practices to ensure that they are robust and maximize the quality of information they disseminate. A second challenge is ensuring that information they receive from third parties and disseminate in support of their actions also meets federal quality standards. A third challenge is providing more timely responses to requests for correction and to appeals of correction

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request denials. As OMB noted in its first annual report to Congress, agencies have had trouble meeting the time frames they have established for themselves for such responses. In particular, they need to dedicate more scientific and other technical resources to respond to challenges involving such issues. Finally, many agencies need to make their correction processes and results more transparent by posting all requests for correction and appeals filed, and the agency responses thereto, on their websites for public access.

**Editor: Can you tell us about the correction request process that the Act indicates? Does the process need to be clarified?**

**Bourdeau:** There are a number of notable characteristics about the correction processes established by the agencies. First, the bar to filing a correction request is very low; nothing in the way of meeting the test established by the courts to show “standing” to pursue a claim is required. Second, the processes are very informal, consisting on the part of a complainant of merely filing a written request for correction or appeal and awaiting a response. There are no hearings, arguments, or examination of witnesses. Third, the appeals are heard by more senior agency officials that are not part of the office that disseminated the information and hopefully have a broader perspective of the agency’s interests in responding to appeals. Finally – and this is critical – the agencies have tremendous discretion as to whether, how, and when to correct information found to be flawed.

Clearly, there can be no hard and fast rule as to when an agency must correct flawed information. In my estimation, however, one of the deficiencies of the correction process is that there is nothing that requires an agency to flag the fact that information in the public domain has been determined not to meet federal quality standards. Moreover, there is no prohibition on use of such information by the agency while corrections are being evaluated and implemented.

**Editor: In April of 2004, OMB provided Congress with a report on the implementation of the Act during 2003. How do they perceive implementation?**

**Bourdeau:** OMB generally thinks that implementation of the Act is proceeding quite well and as intended by Congress. In that regard, OMB made a number of interesting observations in its first annual report:

(1) The agencies have not been overwhelmed by the number of IQA requests for correction. OMB catalogued only 35 that were substantive and distinctly based on the

IQA in the first year of the Act’s implementation.

(2) Although it has taken the agencies longer than they anticipated to respond to requests for correction, none has complained that the process threatens to compromise seriously their regulatory functions.

(3) The correction process has been employed not only by the regulated community but by entities and individuals with diverse interests and of varying political persuasions.

In short, the criticism of some that the IQA would be used extensively by regulated entities to derail or delay agency actions, and would constitute an unwarranted burden on limited agency resources, is premature.

OMB has concluded that suggestions for legislative reform of the IQA at this time are unwarranted. However, OMB has recommended improvements to agency implementation of the Act, including increased transparency of the correction process through postings of correction requests and responses on the agency’s publicly available web pages, enhanced use of agency scientific and technical staff in responding to requests for correction and appeals, and improved timeliness of agency responses to correction requests.

**Editor: Would you tell us about the issue concerning judicial review?**

**Bourdeau:** Two federal district courts have now ruled that judicial review of agency determinations regarding correction requests under the IQA is not available. Both courts determined that there is no private cause of action under the IQA, which is silent on the issue of judicial review. Judge Lee in the Eastern District of Virginia determined, in addition, that review under the Administrative Procedure Act, APA, was not available in the case before him because (a) the agency action there constituted informal advice that was not “final agency action” within the meaning of the APA because it was not determinative of any legal rights or obligations, and (b) according to the court, agency correction decisions are “committed to agency discretion by law” and thus not reviewable because there are no manageable standards by which a court can judge whether an agency properly exercised its discretion. With respect to the former ruling, I would observe that the opinion fails to address the fact that an agency’s final decision on a correction request is indeed determinative of the statutory right an affected party has under the IQA to obtain administrative correction of flawed information failing to meet federal quality standards. With respect to the latter ruling, I would note that while agencies clearly enjoy some latitude in deciding when and how to correct flawed information, the quality stan-

dards set forth in the OMB and agency guidelines would certainly appear to meet the judicial threshold established for standards needed for a court to determine whether an agency decision not to correct information *at all* was warranted. These and other issues are likely to receive further consideration in subsequent judicial challenges that will undoubtedly be brought to other IQA correction decisions.

**Editor: And the issue of peer review in the development of agency-disseminated information?**

**Bourdeau:** The concept of robust peer review plays a prominent role in OMB’s implementing guidelines. First of all, if data and analytic results have been subjected to formal, independent, external peer review, the information enjoys a rebuttal presumption of objectivity. Second, if agency-sponsored peer review is used to help satisfy the objectivity standard, the review process employed should meet the general criteria for competent and credible review recommended by OMB to the President’s Management Council in September 2001. Finally, for “influential” scientific information, which is that which the agency reasonably determines does or will have a clear and substantial impact on important public policies or important private sector decisions, best available peer-reviewed science (to the degree an agency action is based on science) is supposed to apply. In that regard, OMB issued in April 2004 an “Information Quality Bulletin for Peer Review” that requires federal agencies to undertake a peer review of “influential” scientific information before they disseminate it to the public and sets forth standards for the conduct of those reviews.

**Editor: Is there anything you would like to add?**

**Bourdeau:** The IQA is not necessarily an optimal means to challenge the dissemination of agency information in every case. Properly utilized, however, it can accomplish a great deal. With respect to important scientific issues, while challenges to conclusions regarding which reasonable scientific minds can differ are unlikely to be successful, arguments that an agency has not fairly presented both sides of scientific debate, has failed to address uncertainties associated with information presented, or has failed to release sufficient information about underlying data and methods so that it can be determined if the information is substantially capable of being reproduced stand better chances of success, assuming the facts support them. In all cases, however, affected parties need to ensure that their correction request arguments closely track the IQA quality standards.