

>>C. Humphrey: So for the rest of the broadcast what we're going to do is talk about how to avoid ending up in a similar situation anymore.

And now we're going to go to Washington D.C. and we're going to hear about legal framework on project files and administrative records from Attorney-Advisor, Laura Damm.

>> L. Damm: Thanks, Cathy. So we all hear the term document, record, administrative record, decision file, project file, action file. The question is... what do these terms mean and how are they distinguishable? We heard Linda mention a few of these terms. That's what I'm going to try to get at here initially. At the outset I'm going to generally discuss several concepts relating to records and distinguish them, and I hope that it will be helpful to carry through throughout the rest of the broadcast.

So the general term for all agency documents is "records." It's defined in the U.S. Code at 44 USC Section 3301. It's a very lengthy definition. I'm going to summarize three key points. The first are that records are documentary materials regardless of their physical form. What does that mean? That means that records consist of books. They consist of maps. They consist of electronic communications, photos.

The second is that records are created or received by the U.S. Government in the transaction of public business.

The third is that the materials evidence the government's activities or the data included has some informational value.

Now I'm going to distinguish four concepts relating to records. The first concept is that there are general records requirements under the Federal Records Act. They apply to all of us as federal employees and to federal agencies -- as employees of federal agencies. The important thing to know and remember about this is that the Federal Records Act requires all employees to make and preserve records containing adequate and proper documentation of the organization's functions, policies, and decisions. It looks at essential transactions of the agencies, and it's designed to furnish the information necessary to protect the legal rights -- legal and financial rights of the government. The Act, as I mentioned, applies to all of us as employees of the federal government.

The second concept which is, you know, one of the most important ones we're going to talk about today and Megan is going to talk in more detail but I will give a quick introduction, that's a project file. Project files document the agency's work on their decisions. It ensures that the decision-maker had access to information sufficient to render a well-reasoned decision.

The project file is compiled as the documents are generated or received by the government, and it's a contemporaneous record of the decision. This is where there are a lot of other records used too. It's sometimes referred to as a case file, action file, an agency file, official file, issue file, decision file. Today in the broadcast we're going to stick

to the term project file and our discussion is applicable to all these other terms I just mentioned. As I mentioned, Megan is going to speak more about this later on in the broadcast.

The third concept is an administrative record. So when an agency action is subject to judicial review, then an administrative record needs to be compiled to respond to the litigation. The contents of the administrative record can vary depending on the agency action that's being challenged and the specific allegations in the litigation.

Under the Administrative Procedure Act, when a court examines an administrative record it's going to be looking at whether or not the agency action -- whether or not the agency acted arbitrary, capricious, an abuse of discretion or otherwise in accord with law. Michael is going to talk in greater detail about this later on in the presentation. This is just a quick introduction to this particular concept.

The final concept is a FOIA request. I'm sure we're all familiar with these, FOIA requests. A FOIA request is a request from a party for information under the Freedom of Information Act. You know, documents that are produced in response to a FOIA request may not be identical to those that are included in your project files or your administrative record. You know, it may just be a portion of your project file or a portion of your administrative record that's produced.

One important thing that I think we can take into the broadcast, though, is that your project file is really going to be your basis for your administrative record and also for your documents that are produced in response to a FOIA request. They're going to come from the add -- from the project file.

The other thing that I just want to highlight again is that, the documents that are produced in response - documents compiled for the administrative record and in response to a FOIA request may not be all the documents in your project files.

So as Cathy mentioned, the focus of this broadcast is really on creating a project file and compiling an administrative record that, as we heard Linda mention and as we're going to discuss, can be a major task. It can be a big task. It can be exhausting. Hopefully the information that we talk about today will help you throughout this process. The thing to keep in mind, there is information and guidance available. There is help out there. And there are people that have lots of experience with this as well that are good resources.

We posted the following guidance and information that I'm going to talk about to the KRC web site, which is at the bottom of your screen.

The first thing I want to mention is there is a 2003 Washington Office information Bulletin, IB-2003-074. It's at the bottom of your screen as well. It includes a sample filing plan for an administrative record. It's really for Land Use Planning decisions, not an exhaustive list, but some ideas about what generally should be included in the administrative record. So it provides a really good starting point.

There's also State Office guidance available. Utah has a policy and guidance for creating an electronic administrative record. I don't have an IM number for that. But there's your policy at the bottom of your screen.

This policy talks about importance of the administrative record, general advice about preparing an electronic administrative record, converting documents to PDFs, preparing an organized index and hyperlinking, which in my experience, hyperlinking is great, having had to go through an administrative record and find documents for motion practice and preparing briefs. It also talks about some steps that need to be taken before filing the administrative record.

Arizona has an IM, that is IM-AZ-2010-002, guidance on compiling a decision file and an administrative record. Just a quick reminder, a decision file is the same thing as a project file. It provides guidance on maintaining a project file. It was developed to ensure consistency among the various field offices in Arizona, provide some contacts for questions, including our very own Linda Garrison. There's some helpful attachments that provides instructions for setting up a project file, and documents that you may typically see in a project file, and also a sample document index.

I just mention that this guidance is also generally applicable to-- when you're compiling an administrative record as well, but as we talked about before, it's really going to depend on the specific allegations in the complaint and in the litigation and the action that's being challenged.

Oregon has developed an administrative record toolkit, a lit bit of a different approach. The toolkit was developed to assist the field in developing administrative records and project files. It provides a central location for information about process, steps and protocols, again specific to Oregon. It describes roles and responsibilities, policy requirements, provides tips for compiling the administrative record and time lines, which, as we talked about, time lines can be really important when you've got tight deadlines and got to pull all this information together. It includes examples of coding schemas, a checklist, and a Q&A sheet.

Finally, there is some guidance in the BLM NEPA Handbook at chapter 13, section 4. It talks about -- gives some information about compiling an administrative record, general recordkeeping requirements, including some information about who in your office should be maintaining records and how long they should be maintained.

And the final piece of guidance I'm going to talk about is from the solicitor's office. It was issued in 2006. Standardized guidance on compiling a decision file and administrative record. It draws a distinction between a decision file and an administrative record which we're going to talk about on this broadcast. If you want some more reading, it's helpful. Discusses documents typically included in the administrative record. And there's a really good section on electronic communications. It provides some examples, you know, when you get into e-mail chains, attachments, some really good examples in that particular

section on the solicitor's guidance. Finally, it discusses in more detail the Office of the Solicitor's review process and what happens after our office completes the review.

Back to you, Cathy.

>> C. Humphrey: Thanks, Laura. That was very helpful. I hope you clarified some of those terms, we're starting to clarify some of the terms for those of you out in the field between a project file administrative record and the different terminology used for those files.

And I just want to remind you that all the guidance that Laura mentioned, except for the Administrative Procedures Act -- no, the first thing -- the Federal Records Act we don't have on the KRC page, but everything else we posted to the KRC page. We didn't post all of Oregon's entire admin record toolkit but we posted the most pertinent items and there's a couple more things I'm going to post still after this one from Oregon I think will be helpful. And Anne Boeder, who you will hear about in a few minutes, can answer any questions about the Oregon toolkit.

If your state has any additional guidance we would like to know about it. As Laura said we have Utah, Arizona, and some stuff from Oregon, but if anybody else has anything, send it to me and I'll add it to the KRC page with all the others.