



Agency Information Dissemination in the Internet Era

Committee on Administration and Management

Proposed Recommendation | November 2, 2015 **MORRISON EDITS**

1 To carry out their missions, many federal agencies are authorized and even required by
2 statute to issue public statements. Agencies have to maintain a delicate balance when publicly
3 disseminating information. On the one hand, active or passive communication of information by
4 agencies to provide members of the public alerts or data concerning dangers to health, safety, or
5 significant economic harm is essential to protecting society's interests and must be timely to be
6 effective. Information dissemination by agencies also advances the public interest by
7 encouraging public participation in government, fostering innovation, and enabling consumers
8 to make more informed decisions.

9 On the other hand, it has long been recognized that if not conducted under appropriate
10 processes, agency information dissemination has the potential to cause unfair injury to persons
11 or entities that are the subject of the disclosure.¹ In 1973, responding to several incidents in
12 which agency press publicity caused significant harm to private parties, the Administrative
13 Conference issued Recommendation 73-1, "Adverse Agency Publicity."² Recommendation 73-1
14 defined "adverse agency publicity" as "statements made by an agency or its personnel which
15 invite public attention to an agency's action or policy and which may adversely affect persons
16 identified therein."³ Recognizing that adverse agency publicity is undesirable when it is
17 "erroneous, misleading or excessive or it serves no authorized agency purpose," the Conference
18 recommended that agencies adopt rules containing minimum standards and structured practices

¹ See Circular No. A-130, Memorandum for Heads of Executive Departments and Agencies, Management of Information Resources (Nov. 28, 2000). On October 22, 2015, the Office of Management and Budget announced a public comment process to promulgate revisions to Circular No. A-130 to take into account new statutory requirements and enhanced technological capabilities. See Request for Comments on Circular No. A-130, Managing Information as a Strategic Resource, 80 Fed. Reg. **6,4022** (Oct. 22, 2015).

² See Administrative Conference of the United States, Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16,839 (Jun. 27, 1973) [hereinafter Recommendation 73-1].

³ In Recommendation 73-1, the Conference distinguished such publicity "from the mere decision to make records available to the public rather than preserve their confidentiality," as the latter is governed by the Freedom of Information Act (FOIA).

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19 governing the issuance of publicity. Some agencies implemented Recommendation 73-1 by
20 adopting such rules; other agencies responded to the spirit of the Recommendation by adopting
21 less formal internal policies to address these issues; and still other agencies took no action.

22 When Recommendation 73-1 was issued, traditional forms of publicity, such as the press
23 release, were one of the primary vehicles for agencies to communicate with the public.
24 Subsequent technological developments have led to reductions in the cost and great increases
25 in the speed of agencies' collection, storage, and communication of information, including the
26 predominance of Internet-based communications, expansion of the Internet, the emergence of
27 social media,⁴ and the proliferation of searchable online databases capable of storing large
28 amounts of information.⁵ In addition, in recent years, "open government," "open data," and
29 "smart disclosure" initiatives have encouraged agencies to disclose information to the public to
30 enhance government transparency, increase public engagement, and help consumers make
31 smarter choices in the marketplace.⁶

32 In light of these developments, the Conference commissioned a report to study modern
33 agency practices for dissemination of information, identify new challenges, and advise how
34 Recommendation 73-1 might be updated.⁷ The report found that the way in which agencies
35 communicate with the public has evolved. The most salient agency communications are still
36 usually accompanied by targeted agency press releases and more traditional announcements.
37 But agencies also release vast amounts of information to the public without specifically calling

⁴ This recommendation adopts the definition of "social media" in Recommendation 2013-5, which "broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public." Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 242 (Dec. 17, 2013).

⁵ Capital markets, powered by the Internet, are now able respond more quickly to information disseminated by agencies, increasing the risk that share value will be significantly affected by such information, without regard to whether the contents of an initial communication are accurate or interpreted correctly.

⁶ See, e.g., Presidential Documents, Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,683, 4,685 (Jan. 21, 2009); OMB Memorandum M-13-13, Open Data Policy—Managing Information as an Asset (May 9, 2013); Executive Office of the President, Smart Disclosure and Consumer Decision Making: Report of the Task Force on Smart Disclosure (May 30, 2013).

⁷ See Nathan Cortez, Agency Publicity in the Internet Era 1 (September 25, 2015) (Report to the Administrative Conference of the United States) [hereinafter Cortez Report], <https://www.acus.gov/sites/default/files/documents/agency-publicity-in-the-internet-era.pdf>.



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38 attention to it. Some agencies have also established large online databases on their websites
39 through which they passively publish information about private parties to individuals, groups,
40 and organizations that seek out such information and data.

41 As a result, this recommendation, in contrast to Recommendation 73-1, addresses
42 information dissemination by agencies more broadly, rather than focusing on “adverse agency
43 publicity” that specifically invites public attention to agency action or policy. As used in this
44 recommendation, the term “information dissemination” covers agency disclosure of information
45 to the public that may affect persons identified in the disclosure, including information that is
46 collected by agencies and released to the public through online searchable databases.⁸ Although
47 the scope of this recommendation is broader than Recommendation 73-1, the goal remains the
48 same: to encourage agencies to adopt policies and practices that minimize the risk of releasing
49 information to the public that is erroneous, misleading, excessive, or serves no authorized agency
50 purpose. This recommendation therefore builds upon and supplements the 1973
51 Recommendation.

52 **Challenges of Modern Agency Information Dissemination**

53 The report commissioned by the Conference found that modern forms of information
54 dissemination have created new policy and management challenges for agencies.⁹ Most social
55 media, for instance, are designed to disseminate information that can be accessed quickly and
56 shared widely, increasing the risk that at least some important facts or nuances will be lost in the
57 course of disseminating the information. Social media can also create logistical hurdles for
58 agencies, by making it more difficult to control the distribution and content of information.

59 Online searchable databases present unique challenges for agencies because different
60 agency databases are populated with different kinds of data, obtained from different sources,

⁸ “Information dissemination” does not include distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act. This limitation accords with that in Circular A-130.

⁹ See generally Cortez Report, *supra* note 7.



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61 and subject to different quality controls. Such databases may also serve very different purposes.
62 Some databases include data reported by regulated parties, whereas others include data
63 generated by agencies as part of their regulatory enforcement responsibilities, while yet others
64 include data reported by third parties. The quality and reliability of the information collected and
65 made publicly available by the agency may thus vary depending on the nature of the database.
66 This phenomenon requires the adoption of different standards and processes to protect the
67 various public and private interests potentially affected by the information set forth in a
68 particular database. In sum, a one-size-fits-all approach is not feasible, given the variety of
69 searchable online databases.

70 Agency policies governing dissemination of information from database disclosures can be
71 informed by congressional directives,¹⁰ by the experience of other agencies, and by guidance
72 issued in connection with “open government,” “open data,” and “smart disclosure” initiatives.
73 For instance, the Open Data Policy directive issued by the Office of Management and Budget
74 (OMB) directs agencies to ensure that “open data”—publicly available data structured in a way
75 that enables the data to be fully discoverable and usable by end users—is “described fully so that
76 consumers of the data have sufficient information to understand their strengths, weaknesses,
77 analytical limitations, security requirements, as well as how to process them.”¹¹ This and the
78 other standards in the directive are consistent with reconciling the principles of ensuring that the
79 public has broad access to information, while at the same time protecting private parties
80 specifically identified in the information.

81 For more concrete examples of procedures and best practices that may be used to ensure
82 the quality of information disseminated through online databases, agencies can look to the
83 experience of other agencies. For instance, the Consumer Financial Protection Bureau (CFPB)

¹⁰ See Cortez Report, at 20-21 for a discussion of the Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 (codified in various sections of 15 U.S.C.), which requires the Consumer Product Safety Commission (CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer products, and provides various procedural protections to regulated parties.

¹¹ OMB Memorandum M-13-13, *supra* note 6.



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84 publishes a database that allows consumers to submit complaints for various financial
85 products.¹² The agency describes its procedures for publishing complaints in policy statements
86 published in the Federal Register.¹³ When the CFPB receives a consumer complaint, it
87 authenticates the complaint to confirm a commercial relationship existed between the consumer
88 and the company, and forwards the complaint to the company, which can then respond with pre-
89 set, “structured” responses. For a complaint narrative to be published, the consumer must give
90 consent, and personal information must be removed from the complaint. The agency does not
91 publish complaints that: (1) lack critical information, (2) have been referred to other agencies, (3)
92 are duplicative, (4) would reveal trade secrets, (5) are fraudulently submitted, or (6) incorrectly
93 identify the regulated entity. The database also explicitly informs the user that the agency does
94 not verify all of the facts alleged in complaints. These procedures, described in more detail in the
95 report commissioned by the Conference, can provide a useful body of experience that may be
96 helpful to other agencies that are considering establishing policies for information dissemination
97 from similar databases.¹⁴

98 More generally, the Information Quality Act (IQA) can also provide a useful framework
99 for ensuring that information disseminated by agencies is not erroneous, misleading, excessive,
100 or serves no authorized agency purpose.¹⁵ Enacted in 2001, the IQA requires OMB to issue
101 government-wide guidelines to ensure the quality, objectivity, utility, and integrity of information
102 disclosed by agencies. The OMB guidelines implementing the IQA require agencies to issue their
103 own guidelines to ensure the quality of information they disseminate, as well as to “establish
104 administrative mechanisms allowing affected persons to seek and obtain, where appropriate,
105 timely correction of information maintained and disseminated by the agency that does not

¹² See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaint/>.

¹³ See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (Jun. 22, 2012).

¹⁴ See Cortez Report, *supra* note 7 at 62-71.

¹⁵ See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516.



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106 comply with OMB or agency guidelines.”¹⁶ Many agencies have created procedures for
107 requesting correction of agency-disseminated information.

108 The OMB guidelines, however, exempt press releases from the scope of its
109 requirements.¹⁷ Nevertheless, OMB has appeared to support individual agency guidelines that
110 narrow the exemption for press releases.¹⁸ In developing their own guidelines to implement the
111 IQA, agencies they have taken different approaches with respect to the press release
112 exemption.¹⁹ Some agencies have narrowed that exemption to provide that the IQA applies to
113 new substantive information in press releases not covered by previous information
114 dissemination subject to the IQA; others have adopted a broad exemption for press releases. Still
115 others have not addressed the issue at all. OMB’s clarification of the scope of the press release
116 exemption to the IQA could provide a measure of predictability in an area that remains murky.

117 In light of these challenges, and given the overarching goal of balancing public and private
118 interests, the Conference recommends that agencies adopt the following policies and best
119 practices.

RECOMMENDATION

- 120 1. *Written policies.* Agencies that routinely engage in information dissemination that
121 identifies individuals or private parties should adopt written policies addressing the
122 content and procedures for information dissemination.
- 123 a. These policies should include clear internal lines of responsibility for publishing
124 information, and safeguards to ensure accuracy, if information is presented as
125 accurate by the agency.

¹⁶ 67 Fed. Reg. 8,452, 8,460 (Feb. 22, 2002).

¹⁷ *Id.* The guidelines also exempt opinions and adjudicative processes, but those exemptions are beyond the scope of this recommendation.

¹⁸ See Memorandum for President’s Management Council, Agency Draft Information Quality Guidelines, from John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB (June 10, 2002).

¹⁹ See Cortez Report, *supra* note 7, Appendix G.



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- 126 b. These policies should extend to social media and other forms of Internet-based
127 information dissemination.
- 128 2. *Database disclosures.* Agencies that create and maintain online databases should adopt
129 written policies governing dissemination of information through their databases. Those
130 policies should include the following best practices:
- 131 a. Agencies should ensure that users are informed of the source(s), context,
132 procedures taken to ensure data quality, and any limitations on the accuracy of
133 the information contained in the database, including whether the information
134 has been verified or authenticated by the agency.
- 135 b. Agencies should ensure that subjects identified in the database are given the
136 opportunity to post responses or request corrections or retractions, **subject to**
137 **reasonable exceptions in the public interest.**
- 138 3. *Publication of policies.* Agencies should publish online their information dissemination
139 policies.
- 140 4. *Employee training.* Agencies should provide their employees with training on their
141 information dissemination policies.
- 142 5. *Advanced notice.* Where practicable, consistent with the nature of the information to
143 be disseminated, and reasonable under the circumstances, agencies should give
144 advance notice to subjects identified in the agencies' dissemination of information.
- 145 6. *Publicizing investigations and other preliminary actions.* Agencies should not publicize
146 preliminary investigations directed at a member of the public or a regulated entity as to
147 which the agency has not reached a formal internal conclusion, except where required
148 by statute or in circumstances supported by the public interest.

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- 149 7. *Publicly disclosing legal complaints and agency adjudicatory proceedings.* If agencies
150 publicize legal complaints or the commencement of an adjudicatory proceeding, **when**
151 **practicable**, they should do so only with a clear explanation that the allegations have
152 not been adjudicated and may be disputed.
- 153 8. *Clarifying the Information Quality Act as to Press Releases.* OMB should consider
154 clarifying whether the Information Quality Act applies to new, substantive information
155 in press releases that has not been previously disseminated by the agency.
- 156 9. *Objections, corrections, and retractions.* Agencies that engage in information
157 dissemination not subject to the Information Quality Act should adopt procedures for
158 accepting and responding to objections to information disseminated by the agency, and
159 for correcting and retracting materially inaccurate statements, subject to exceptions in
160 the public interest. Agencies should furnish the public with a designated point of
161 contact within the agency for submission of objections.

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