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

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


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

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

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

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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.


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

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

Challenges of Modern Agency Information Dissemination

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

Online searchable databases present unique challenges for agencies because different agency databases are populated with different kinds of data, obtained from different sources,
and subject to different quality controls. Such databases may also serve very different purposes.

Some databases include data reported by regulated parties, whereas others include data
generated by agencies as part of their regulatory enforcement responsibilities, while yet others
include data reported by third parties. The quality and reliability of the information collected and
made publicly available by the agency may thus vary depending on the nature of the database.

This phenomenon requires the adoption of different standards and processes to protect the
various public and private interests potentially affected by the information set forth in a
particular database. In sum, a one-size-fits-all approach is not feasible, given the variety of
searchable online databases.

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

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

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

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13 See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77

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comply with OMB or agency guidelines." Many agencies have created procedures for requesting correction of agency-disseminated information.

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

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

**RECOMMENDATION**

1. *Written policies.* Agencies that routinely engage in information dissemination that identifies individuals or private parties should adopt written policies addressing the content and procedures for information dissemination.

   a. These policies should include clear internal lines of responsibility for publishing information, and safeguards to ensure accuracy, if information is presented as accurate by the agency.

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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.
These policies should extend to social media and other forms of Internet-based information dissemination.

2. **Database disclosures.** Agencies that create and maintain online databases should adopt written policies governing dissemination of information through their databases. Those policies should include the following best practices:

   a. Agencies should ensure that users are informed of the source(s), context, procedures taken to ensure data quality, and any limitations on the accuracy of the information contained in the database, including whether the information has been verified or authenticated by the agency.

   b. **Agencies should ensure that subjects identified in the database are given the opportunity to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.**

3. **Publication of policies.** Agencies should publish online their information dissemination policies.

4. **Employee training.** Agencies should provide their employees with training on their information dissemination policies.

5. **Advanced notice.** Where practicable, consistent with the nature of the information to be disseminated, and reasonable under the circumstances, agencies should give advance notice to subjects identified in the agencies’ dissemination of information.

6. **Publicizing investigations and other preliminary actions.** Agencies should not publicize preliminary investigations directed at a member of the public or a regulated entity as to which the agency has not reached a formal internal conclusion, except where required by statute or in circumstances supported by the public interest.
7. **Publicly disclosing legal complaints and agency adjudicatory proceedings.** If agencies publicize legal complaints or the commencement of an adjudicatory proceeding, when practicable, they should do so only with a clear explanation that the allegations have not been adjudicated and may be disputed.

8. **Clarifying the Information Quality Act as to Press Releases.** OMB should consider clarifying whether the Information Quality Act applies to new, substantive information in press releases that has not been previously disseminated by the agency.

9. **Objections, corrections, and retractions.** Agencies that engage in information dissemination not subject to the Information Quality Act should adopt procedures for accepting and responding to objections to information disseminated by the agency, and for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest. Agencies should furnish the public with a designated point of contact within the agency for submission of objections.

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