Agency Information Dissemination in the Internet Era

Committee on Administration and Management

Proposed Recommendation | November 2, 2015

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

Commented [SM1]: These two sentences seem to still equate public statements with information dissemination. Given the changes made in the rest of the paper I would change the first sentence to end with “publish information.”

Commented [SM2]: Given the emphasis made during the meeting on including a fuller discussion of the benefits of disseminating health and safety information, I expected more about the importance/necessity of publishing timely information related to health or safety concern, even when that information is incomplete or uncertain. Either here or elsewhere a more detailed discussion should be added that notes some of the most obvious reasons that information should be released even when it may not be certain or complete. Examples of public safety warnings which needed to be narrowed or clarified later are a good example. The paper should clearly state that ACUS is not suggesting that agencies refrain from disclosing information necessary to protect public health or safety, even if that information is incomplete or uncertain.

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).
recommended that agencies adopt rules containing minimum standards and structured practices 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

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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. 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).


Commented [SM3]: Many of the policies did more than encourage disclosure, they required it. To use the term encourage makes it seem that the agency actions are voluntary and potentially unauthorized.
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 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, as practicable, 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.

Commented [SM4]: There was discussion at the last meeting about targeted versus untargeted disclosures. This line notes that targeted communications (those that seek to specifically highlight particular entities) are the most important types of communications for this issue. Yet almost none of the rest of the paper makes the distinction and there is no distinction in the recommendations.

Commented [SM5]: What does excessive mean in this context? I would cut it if it can’t be defined.
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 required and/or informed by congressional directives, 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.” 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

Commented [SM6]: This is an important point and does not just apply to databases. The point should be moved or repeated elsewhere to make it clear that depending on the work and information of different components and programs, different policies to oversee disclosure may be needed.


11 OMB Memorandum M-13-13, supra note 6.
the experience of other agencies. For instance, the Consumer Financial Protection Bureau
(CFPB) 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

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13 See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77
15 See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-

[DRAFT: October 26, 2015]
does not comply with OMB or agency guidelines.” Many–Most 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, if they do not already have them, addressing the content and procedures for information dissemination. These need not be a single set of agency-wide policies as different programs, divisions, etc. may have different information and process needs.

Commented [SM8]: Only a small number of agencies didn’t produce IQA guidelines.

Commented [SM9]: The IQA policies by agencies went beyond just a process to request corrections. These were guidelines on maintaining the data quality for information disseminated by an agency.

We also discussed that subsequent policies - the Open Data Memo I believe, extended some of the IQA responsibilities to databases. I think that should be pointed out.

I also think it should be noted that for some (if not many) agencies, their IQA guidelines may suffice to fulfill these recommendations. If ACUS doesn’t believe these public policies are sufficient, then that the paper should offer some explanation of the deficiencies of those IQA policies.


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

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).

See Cortez Report, supra note 7, Appendix G.
a. These policies should include clear internal lines of responsibility for publishing information, and safeguards to ensure accuracy, quality, and integrity, if information is presented as accurate by the agency.

b. 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, as practicable and 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 or taken a public action, 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 routinely engage in information dissemination that identifies individuals or private parties but have not produced not subject to the Information Quality Act guidelines 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.

Commented [SM10]: I'm not clear on what justifies giving investigations its own special recommendation? The paper doesn't include any earlier discussion of them -- like is done for databases -- making the case that they are special or reside in some policy niche that needs to be addressed.

I would think that the first recommendation on written policies would also cover announcements on investigations, violations, etc. and would be sufficient. Unless more a substantive argument can be made for treating these announcements differently, I would suggest that this recommendation cut entirely.

You might include the terms “publicizing investigations and other preliminary actions” in the first recommendation someplace to slightly emphasize these disclosures. But I'm not even sure I see the need for that.

Commented [SM11]: Again this recommendation makes it appear that the only thing the IQA provides that must be duplicated is the correction request mechanism.

Generally this is also a duplication of recommendation 1B, so the easiest thing would probably be to cut this entire recommendation. Unless there is a compelling difference to this recommendation versus 1B.