



## Agency Information Dissemination in the Internet Era

### Committee on Administration and Management

#### Proposed Recommendation | November 2, 2015 [GARY BASS 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  
4 by agencies to provide members of the public alerts or data concerning dangers to health,  
5 safety, or significant economic harm is essential to protecting society's interests and must be  
6 timely to be effective. Information dissemination by agencies also advances the public interest  
7 by encouraging public participation in government, fostering innovation, and enabling  
8 consumers 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.<sup>1</sup> 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."<sup>2</sup> 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."<sup>3</sup> Recognizing that adverse agency publicity is undesirable when it is  
17 "erroneous, misleading or excessive or it serves no authorized agency purpose," the Conference

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<sup>1</sup> 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).

<sup>2</sup> 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].

<sup>3</sup> 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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18 recommended that agencies adopt rules containing minimum standards and structured  
19 practices governing the issuance of publicity. Some agencies implemented Recommendation  
20 73-1 by adopting such rules; other agencies responded to the spirit of the Recommendation by  
21 adopting less formal internal policies to address these issues; and still other agencies took no  
22 action.

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

33 In light of these developments, the Conference commissioned a report to study modern  
34 agency practices for dissemination of information, identify new challenges, and advise how  
35 Recommendation 73-1 might be updated.<sup>7</sup> The report found that the way in which agencies  
36 communicate with the public has evolved. The most salient agency communications are still

<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 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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37 usually accompanied by targeted agency press releases and more traditional announcements.  
38 But agencies also release vast amounts of information to the public without specifically calling  
39 attention to it. Some agencies have also established large online databases on their websites  
40 through which they passively publish information about private parties to individuals, groups,  
41 and organizations that seek out such information and data.

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

### 53 **Challenges of Modern Agency Information Dissemination**

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

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<sup>8</sup> “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.

<sup>9</sup> See generally Cortez Report, *supra* note 7.



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60 The challenges described herein should be juxtaposed with the fact that information  
61 about potential dangers can reach the public faster and with more precision and accuracy than  
62 ever before.

63 Online searchable databases present unique challenges for agencies because different  
64 agency databases are populated with different kinds of data, obtained from different sources,  
65 and subject to different quality controls. Such databases may also serve very different  
66 purposes. Some databases include data reported by regulated parties, whereas others include  
67 data generated by agencies as part of their regulatory enforcement responsibilities, while yet  
68 others include data reported by third parties. The quality and reliability of the information  
69 collected and made publicly available by the agency may thus vary depending on the nature of  
70 the database. Moreover, the definition of quality and reliability may also differ from agency to  
71 agency or even database to database. This phenomenon requires the adoption of different  
72 standards and processes to protect the various public and private interests potentially affected  
73 by the information set forth in a particular database. In sum, a one-size-fits-all approach is not  
74 feasible, given the variety of searchable online databases.

75 Agency policies governing dissemination of information from database disclosures can  
76 be informed by congressional directives,<sup>10</sup> by the experience of other agencies, and by guidance  
77 issued in connection with “open government,” “open data,” and “smart disclosure” initiatives.  
78 For instance, the Open Data Policy directive issued by the Office of Management and Budget  
79 (OMB) directs agencies to ensure that “open data”—publicly available data structured in a way  
80 that enables the data to be fully discoverable and usable by end users—is “described fully so  
81 that consumers of the data have sufficient information to understand their strengths,  
82 weaknesses, analytical limitations, security requirements, as well as how to process them.”<sup>11</sup>  
83 This and the other standards in the directive are consistent with ~~reconciling~~ the principles of

<sup>10</sup> 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.

<sup>11</sup> OMB Memorandum M-13-13, *supra* note 6.



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84 ensuring that the public has broad access to high quality information and to content about,  
85 ~~while at the same time protecting private parties specifically identified in the information~~  
86 limitations of the information.

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

104 More generally, the Information Quality Act (IQA) can also provide a useful framework  
105 for ensuring that information disseminated by agencies is not erroneous, misleading, excessive,  
106 or serves no authorized agency purpose.<sup>15</sup> Enacted in 2001, the IQA requires OMB to issue

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

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

<sup>14</sup> See Cortez Report, *supra* note 7 at 62-71.

<sup>15</sup> 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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107 government-wide guidelines to ensure the quality, objectivity, utility, and integrity of  
108 information disclosed by agencies. The OMB guidelines implementing the IQA require agencies  
109 to issue their own guidelines to ensure the quality of information they disseminate, as well as  
110 to “establish administrative mechanisms allowing affected persons to seek and obtain, where  
111 appropriate, timely correction of information maintained and disseminated by the agency that  
112 does not comply with OMB or agency guidelines.”<sup>16</sup> Many agencies have created procedures  
113 for requesting correction of agency-disseminated information.

114 The OMB guidelines, ~~however,~~ exempt press releases from the scope of its  
115 requirements.<sup>17</sup> ~~Nevertheless, OMB has appeared to support individual agency guidelines that~~  
116 ~~narrow the exemption for press releases.~~<sup>18</sup> In developing their own guidelines to implement  
117 the IQA, agencies ~~they~~ have taken different approaches with respect to the press release  
118 exemption ~~with acknowledgement from OMB that doing so is consistent with the IQA.~~<sup>19</sup> Some  
119 agencies have narrowed that exemption to provide that the IQA applies to new substantive  
120 information in press releases not covered by previous information dissemination subject to the  
121 IQA; others have adopted a broad exemption for press releases. Still others have not addressed  
122 the issue at all. ~~OMB’s clarification of the scope of the press release exemption to the IQA~~  
123 ~~could provide a measure of predictability in an area that remains murky. These actions are~~  
124 ~~consistent with the principle of allowing an agency to make determinations that fit the mission~~  
125 ~~and needs of the agency.~~

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

<sup>16</sup> 67 Fed. Reg. 8,452, 8,460 (Feb. 22, 2002).

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

<sup>18</sup> 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).

<sup>19</sup> See Cortez Report, *supra* note 7, Appendix G.

**Commented [GDB1]:** This seems like an overstatement. OMB has not changed its policy regarding exemption of press releases. However, OMB indicates that agencies may choose to cover press releases under the IQA if they wish. Doing so would not be inconsistent with the OMB guidance, according to OMB.

The referenced OMB memo is a review of agency draft IQA plans. It states: “The specific examples discussed below include modifications that appear reasonable and consistent with the approach OMB takes in its guidelines, as well as suggestions for improvement and greater consistency with the OMB guidelines. We suggest that agencies consider these approaches for their own use.” In the list that follows is a discussion of exempting press releases.

The memo quotes from EPA’s draft plan: “For example, EPA states ‘These guidelines do not apply to press releases, fact sheets, press conferences or similar communications in any medium that announce, support the announcement or give public notice of information EPA has disseminated elsewhere.’ This limitation avoids creating an incentive to misuse press releases to circumvent information quality standards.”

**Commented [GDB2]:** There is no evidence that any of this is murky. The fact that some agencies have exempted press releases and others have not – and that OMB indicated during draft plans that such approaches were okay seems appropriate and consistent with the principle that one size does not fit all. Additionally, OMB approved the agency final IQA plans that had differing approaches to press releases indicating that agencies are free to make adjustments to fit their needs.



## RECOMMENDATION

- 129 1. *Written policies.* Agencies that routinely engage in information dissemination that  
130 identifies individuals or private parties should adopt written policies addressing the  
131 content and procedures for information dissemination.
- 132 a. These policies should include clear internal lines of responsibility for publishing  
133 information, and safeguards to ensure accuracy, if information is presented as  
134 accurate by the agency.
- 135 b. These policies should extend to social media and other forms of Internet-based  
136 information dissemination.
- 137 2. *Database disclosures.* Agencies that create and maintain online databases should adopt  
138 written policies governing dissemination of information through their databases. Those  
139 policies should include the following best practices:
- 140 a. Agencies should ensure that users are informed of the source(s), context,  
141 procedures taken to ensure data quality, and any limitations on the integrity,  
142 objectivity, accuracy or reliability of the information contained in the database,  
143 including whether the information has been verified or authenticated by the  
144 agency.
- 145 b. Agencies should ensure that subjects identified in the database are given the  
146 opportunity to post responses or request corrections or retractions, subject to  
147 reasonable exceptions in the public interest.
- 148 3. *Publication of policies.* Agencies should publish online their information dissemination  
149 policies.
- 150 4. *Employee training.* Agencies should provide their employees with training on their  
151 information dissemination policies.

**Commented [GDB3]:** What does this mean? Is there a definition?



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

155 6. *Publicizing investigations and other preliminary actions.* Agencies should not publicize  
156 preliminary investigations directed at a member of the public or a regulated entity as to  
157 which the agency has not reached a formal internal conclusion, except where required  
158 by statute or in circumstances supported by the public interest.

159 7. *Publicly disclosing legal complaints and agency adjudicatory proceedings.* If agencies  
160 publicize legal complaints or the commencement of an adjudicatory proceeding, when  
161 practicable, they should do so only with a clear explanation that the allegations have not  
162 been adjudicated and may be disputed.

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

166 ~~9.8. *Objections, corrections, and retractions.* Agencies that engage in information  
167 dissemination not subject to the Information Quality Act should adopt procedures for  
168 accepting and responding to objections to information disseminated by the agency, and  
169 for correcting and retracting materially inaccurate statements, subject to exceptions in  
170 the public interest. Agencies should furnish the public with a designated point of  
171 contact within the agency for submission of objections.~~

**Commented [GDB4]:** What does this mean? Is there a definition? By definition a preliminary investigation means that the agency has reached some conclusion that requires them to act.

**Commented [GDB5]:** What does this mean? Is there a definition?

**Commented [GDB6]:** What does this mean?

**Commented [GDB7]:** This recommendation (#6) either needs a substantial rewrite or should be deleted. Here are three recent examples where investigations have been disclosed. This recommendation would give the impression that ACUS is suggesting such information should not be disclosed to the public excepted if "supported by the public interest" which isn't defined.

EXAMPLE 1: IBM disclosed through its public filing at SEC that the company is under investigation for accounting practices in US, Britain, and Ireland. The SEC data is regularly disclosed to the public. Does the SEC need to excise the information from its database? Or is this supported by the public interest?

EXAMPLE 2: FDA released two reports about its investigation of Theranos, a blood-testing company. Does this recommendation suggest FDA should not do that? Or is this another example of supported by the public interest? Theranos claims it has addressed the deficiencies identified by FDA. That would suggest that Theranos does not agree that disclosure is supported by the public interest. Does that mean FDA shouldn't disclose the investigations?

EXAMPLE 3: EPA's Enforcement and Compliance History Online (ECHO), a searchable, publicly accessible database about corporate violations, provides data on "informal enforcement actions." Are these considered "preliminary investigations"? They aren't "formal" conclusions. (More about this in the Echo data dictionary at <http://echo.epa.gov/help/reports/dfr-data-dictionary>. Exactly the type of metadata that ACUS should be applauding.) Here's a sample record: <http://echo.epa.gov/detailed-facility-report?fid=110059763536>

**Commented [GDB8]:** What does this mean?

**Commented [GDB9]:** I have already indicated above that there is no need for OMB clarification of press releases. As explained in Comment #1, the draft ACUS recommendation is based on a misreading of OMB's memo. This recommendation should be deleted.

**Commented [GDB10]:** How is this recommendation any different than 2b? It seems highly redundant and should be deleted.