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

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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

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
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.

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],
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 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.

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

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. Moreover, the definition of quality and reliability may also differ from agency to agency or even database to 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, 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

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11 OMB Memorandum M-13-13, supra note 6.
ensuring that the public has broad access to high quality information and to content about, while at the same time protecting private parties specifically identified in the information any limitations of 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) publishes a database that allows consumers to submit complaints for various financial products.\(^\text{12}\) The agency describes its procedures for publishing complaints in policy statements published in the Federal Register.\(^\text{13}\) 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.\(^\text{14}\)

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.\(^\text{15}\) Enacted in 2001, the IQA requires OMB to issue


\(^{\text{14}}\) See Cortez Report, supra note 7 at 62-71.

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 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 with acknowledgement from OMB that doing so is consistent with the IQA. 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.

These actions are consistent with the principle of allowing an agency to make determinations that fit the mission and needs of the agency.

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.

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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

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.
   
   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 integrity, objectivity, accuracy or reliability 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.

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

[DRAFT: October 26, 2015]
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.

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?


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.