A fundamental characteristic of agency adjudications that incorporate a legally required evidentiary hearing is the existence of an exclusive record for decision making.\(^1\) The exclusive record in adjudications regulated by the formal-hearing provisions of the Administrative Procedure Act (APA) consists of the “transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.”\(^2\) Many other adjudications in which an evidentiary hearing is required by statute, regulation, or executive order, though not governed by those provisions, also rely on an exclusive record similarly constituted.\(^3\) The exclusive record principle ensures that parties know and can meet the evidence against them; promotes accurate, evidence-based decision making; and facilitates administrative and judicial review.

Although an exclusive record consists primarily of materials submitted by the parties to a proceeding, it may be appropriate or beneficial in certain circumstances for adjudicators to use information obtained through their own and their staffs’ independent research. “Independent research,” for purposes of this Recommendation, refers to an adjudicator’s search for, consideration of, or reliance on documentary materials other than materials submitted by a party or interested member of the public or adduced with a party’s participation, or materials consulted

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\(^3\) Recommendation 2016-4, supra note 1, ¶ 1. The Conference’s recent recommendations divided adjudications into three categories: those governed by the APA’s formal-hearing provisions of the APA (referred to as Type A the report accompanying Recommendation 2016-4, supra note 1); those that incorporate a legally required evidentiary hearing not regulated by the APA’s formal-hearing provisions (referred to as Type B); and those not subject to a legally required evidentiary hearing (referred to as Type C). This recommendation addresses only Type A and Type B adjudications. It does not address Type C adjudications.
for legal research purposes, for purposes of resolving a proceeding pending before the adjudicator.

This definition of independent research encompasses a diverse range of practices. Official notice offers the most familiar use of independent research practice. Official notice, which is the administrative corollary of judicial notice, permits an adjudicator to accept a fact as true without requiring a party to prove the fact through the introduction of evidence. In appropriate circumstances, an adjudicator may do so on his or her own motion based on information identified through independent research.

Besides official notice, adjudicators may, in appropriate circumstances, wish to conduct independent research to learn background information in preparation for a hearing; define the ordinary or technical meaning of terms; assess a party’s or witness’s credibility; determine an expert’s qualifications; assess the reliability of an expert’s opinion; or interpret or evaluate existing evidence. The facts identified through independent research may be adjudicative (i.e., “the facts of the particular case”) or legislative (i.e., “those which have relevance to legal reasoning and the lawmaking process”).

Congress, courts, agencies, and scholars have long debated the extent to which agency adjudicators may and should conduct independent research. While some forms of independent research are firmly rooted in longstanding agency practices, others have proven more controversial in certain circumstances. The growth of the internet has amplified this debate in recent years as adjudicators now have quicker and easier access to vastly greater amounts of information. Information that is now available to adjudicators includes online versions of

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Commented [JG1]: The Committee may wish to consider whether the definition of “independent research” should exclude independent legal research. The Committee may also wish to consider what constitutes independent legal research and what distinguishes it from independent factual research (e.g., consulting dictionaries to interpret statutory or regulatory terms, agency guidance materials, the regulations or guidance materials of other agencies, foreign law, law review articles, etc.).

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6 Fed. R. Evid. 201(a) Advisory Committee Note.
8 See generally Jeremy Graboyes, Internet Evidence in Agency Adjudication X-X (<Date>) (report to the Admin. Conf. of the U.S.), available at <URL>.
traditional print publications and public records, as well as newer forms of information such as
openly editable encyclopedias, blogs, social media, and personal and professional websites.

Although information available on the internet can be just as reliable as information
available in print publications, the nature of internet publication can make it more difficult for
adjudicators to determine the authenticity and reliability of certain internet information. The
impermanence of web publication may also affect the compilation of an exclusive record for
administrative and judicial review.

Various sources of law may govern independent research by agency adjudicators.
Perhaps the most important is constitutional due process. For example, an agency may take
official notice of independently obtained factual information so long as it offers the parties a
reasonable opportunity to show the contrary.\(^9\) What constitutes a reasonable opportunity to show
the contrary will depend on whether a fact is adjudicative or legislative and the degree to which
it is disputed or critical to a case’s outcome.\(^10\) Constitutional due process also generally requires
that an adjudicator be impartial.\(^11\) Whether an act of independent research will render an
adjudicator impartial or raise doubt about the integrity of a proceeding may depend on the
specific features of an agency’s adjudicatory program.\(^12\)

The APA also governs independent research in adjudications conducted according to its
formal-hearing provisions. For example, with respect to official notice, the APA provides that
“[w]hen an agency decision rests on official notice of a material fact not appearing in the
evidence of record, a party is entitled, on timely request, to an opportunity to show the

\(^9\) Ohio Bell Tel. Co., 301 U.S. at 300-06.
\(^10\) Hickman & Pierce, supra note 4, § 9.6.1.
\(^12\) See Recommendation 2018-4, supra note 11, ¶ 3.
contrary.” Materials identified through independent research may be hearsay. Although hearsay is generally admissible in administrative hearings “up to the point of relevancy,” the APA specifies that a party is entitled to “conduct such cross-examination as may be required for a full and true disclosure of the facts.” Unless an exception applies, the APA also prohibits an employee who performed an investigative or prosecutorial function in a case from participating or advising in the decision or review of the same or a factually related case except as a witness or counsel. Whether an act of independent research constitutes a prohibited investigation or prosecution may depend on the specific features of an agency’s proceedings.

Additional legal requirements may derive from agency-specific statutes; agency rules of procedure, practice, and evidence, especially those that adopt or incorporate the Federal Rules of Evidence; and agency precedential decisions. Even when independent research would be legally acceptable, policy considerations may counsel in favor or against its exercise. Policy considerations include adjudicative best practices such as the need for accuracy, consistency, and administrative efficiency in agency decision-making.

Because adjudications vary widely in their purpose, scope, complexity, and effects, a one-size-fits-all approach to independent research across federal adjudications is neither practicable nor desirable. Some adjudications are adversarial; others are non-adversarial. In some contexts, the government brings an action against a private party; in others, a private party petitions the government, or the government resolves a dispute between private parties. Some agencies have adopted the Federal Rules of Evidence; others have developed evidentiary rules to suit their specific needs. Adjudicators in some contexts have an affirmative duty to develop the

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14 A statement is “hearsay” if it is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c).
17 Id. § 554(d) (2019). This prohibition does not apply in determining applications for initial licenses; to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carrier; or to the agency or member or members of the body comprising the agency. Id.
18 Graboyes, supra note 8, at X–X.
record or assist unrepresented parties; adjudicators in other contexts have no such obligation.

Some adjudicators play an active role questioning parties and witnesses and calling experts;

others do not. Adjudicators vary in the degree to which they are viewed as subject-matter experts
and the extent to which they have access to the expertise of agency policy makers.

This recommendation encourages agencies that conduct adjudications involving a legally
required evidentiary hearing to develop appropriate rules on independent research. The rules
could take different forms depending on the circumstances. In some circumstances, an agency
may consider publishing a legislative rule (which generally requires an agency to solicit public
comment) or a rule of agency organization, procedure, or practice (which does not). In other
circumstances, an agency pronouncement that is categorized as a “guidance document,”
including an interpretative rule or general statement of policy, may be suitable. The appropriate
form of an agency’s rule on independent research will depend on the rule’s substance and
intended effect and on the unique circumstances of the agency’s adjudicatory program.

Although the emphasis of this recommendation is the particular phenomenon of
independent internet research, its recommended best practices apply equally to independently
research by other means since the principles for both must be the same.

RECOMMENDATION

The following recommendations offer best practices for agencies to consider when they identify
patterns of independent research by agency adjudicators. Agencies should consider
implementing the following best practices, as appropriate, in consultation with adjudicators.

Identifying the Need for Rules on Independent Research

1. If agencies find that adjudicators regularly conduct independent research on a specific
subject, they should consider whether rules can be developed to resolve or reduce

Commented [JG2]: The Committee may wish to consider the instrument by which the agency announces this policy (e.g., legislative rule, procedural rule, or guidance document).

19. See 5 C.F.R. § 551(4) (2019) (defining a “rule” as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requires of an agency”).

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adjudicators’ need for independently obtained information. In some cases, this may take the form of a legislative rule, for example one that defines a term or resolves uncertainty.

2. Agencies should identify those circumstances in which independent research is likely to result in actual or perceived bias or partiality, including personal animus against a party or group to which that party belongs or prejudgment of the adjudicative facts at issue in the proceeding, or otherwise result in unfairness. In determining whether particular exercises of independent research are likely to have those effects, agencies should consider the specific features of their adjudicative proceedings and institutional needs. For example, an adjudicator’s recognized duty to develop the record may permit independent research in some instances in which independent research would otherwise place an undue or unfair burden on the subject of an agency enforcement action. Hearsay evidence may be more acceptable in some circumstances than in others.

3. Agencies should identify those circumstances in which independent research is likely to be inefficient or result in inaccurate outcomes making or inconsistencies across different cases. In determining whether particular exercises of independent research are likely to have those effects, agencies should consider the specific features of their adjudicative proceedings and institutional needs, including:
   a. Whether sufficient resources are available for adjudicators or adjudicative staff to conduct independent research given an agency’s adjudicative caseload volume and capacity and other administrative priorities;
   b. Whether it will be difficult or excessively time-consuming for adjudicators or adjudicative staff to locate certain information through independent research;
   c. Whether it will be difficult or excessively time-consuming for adjudicators or adjudicative staff to establish the authenticity and reliability of information for which independent research is being conducted;
   d. Whether an adjudicator can more accurately obtain the desired information from the parties or from an expert witness;
   e. Whether independent research will reopen a closed administrative record or require a supplemental hearing.

Commented [JG3]: See comment above.
Developing Rules and Procedures for Independent Research

4. If agencies identify reliable sources or categories of sources that it determines would be appropriate for adjudicators to independently consult, they should publish rules that identify the sources or categories of sources and state that adjudicators may independently consult them for purposes of an adjudication. These rules should clarify whether adjudicators may consult other, unenumerated resources related to the subject.

5. Agencies should promulgate rules on official notice. They should specify the procedures that an adjudicator must follow when an agency decision rests on official notice of a material fact and ensure that parties, in appropriate circumstances and upon timely request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn from the fact; and supplement, explain, or give different perspective to the fact. The precise nature of an opportunity for rebuttal may depend on factors such as whether a fact is general or specific to the parties, whether a fact is reasonably disputable or indisputable, whether a fact is central or peripheral to the adjudication, and whether a decision represents an initial or a final action of an agency.

6. If agencies intend that specific procedures will apply when adjudicators use independently obtained information for purposes other than official notice of a material fact, they should publish rules that clarify the distinction between official notice and other uses of information independently obtained by an adjudicator and describe the applicable procedures, if any. In particular, agencies should consider distinguishing, as appropriate, legal research from factual research; and material facts from facts that are not material, such as background facts.

7. Agency rules on independent research should specify when adjudicators must physically or electronically put independently obtained materials, especially internet materials, in an administrative record and explain what procedures adjudicators should follow to do so to ensure they preserve evidence in a stable, permanent form.

8. If agencies’ rules permit adjudicators to independently consult sources that are not specifically designated in an agency rule, they should consider publishing rules to help
adjudicators assess the authenticity and reliability of internet information. Agencies should consider including at least the following indicia of authenticity and reliability in such rules:

a. Whether the information was authored by an identifiable and easily authenticated institutional or individual author who is considered an expert or reputable authority on the subject;

b. Whether the author published the information for a purpose other than commerce, advocacy, or promotion;

c. Whether the author developed the information according to a sound methodology;

d. Whether the information references other authorities which help to corroborate its accuracy;

e. Whether the meaning and significance of the information is clear and not susceptible to misinterpretation;

f. Whether the information is published in a final format rather than a continuously or openly editable format;

g. Whether the information remains current;

h. Whether the information has been available for a long enough period to allow erroneous information to be corrected or potentially misleading information to be contextualized;

i. Whether the owner or administrator of the website on which the information appears is easily authenticated, is a recognized authority or resource, and maintains the website for a purpose other than commerce, advocacy, or promotion;

j. Whether information that appears on the website undergoes editorial or peer review;

k. Whether the information is of a type that ordinarily appears on the website or other, similar websites; and
1. Whether other resources characterized by sufficient indicia of reliability contain the same information or cite to the original information as reliable or authoritative.

Providing Access to Sources Used for Independent Research

9. When an agency rule designates a source that is appropriate for independent research, the agency should consider clearly identifying and providing access to the source on its website. Agencies should ensure that all sources that they host on their websites are kept up to date. If agencies provide hyperlinks to sources that are hosted on websites not maintained by the agency, they should ensure that both the hyperlinks on their own websites and the materials on third-party sites remain current and accurate.

10. When agencies provide access to sources on their websites or on a third-party website, they should include a plain-language statement that clearly explains how adjudicators and parties may use the information contained in those sources.

11. If an adjudicator intends to rely on an independently obtained source that is not available to the parties on or through an agency website, the adjudicator should ensure that the parties have reasonable access to the source or to a relevant excerpt from the source.