



**Internet Evidence [Independent Research] in Agency Adjudication
in the Internet Age]**

Committee on Adjudication

Proposed Recommendation for Committee | September 26, 2019

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

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

Commented [A1]: How do we define “adjudicator”? Does it include agency heads?

¹ Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 20-21 (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

² 5 U.S.C. § 556(e) ~~(2019)~~.

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.



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16 materials ~~traditionally~~ consulted ~~by an agency's adjudicators for legal research purposes (e.g., ...)~~,
17 for purposes of resolving a proceeding pending before the ~~agency~~ adjudicator.

Commented [A2]: Define "legal research" and make clear that the list is not exhaustive.

18 This definition of independent research encompasses a diverse range of practices. Official
19 notice offers the most familiar use of independent research practice. Official notice, which is the
20 administrative corollary of judicial notice, permits an adjudicator to accept a fact as true without
21 requiring a party to prove the fact through the introduction of evidence.⁴ In appropriate
22 circumstances, an adjudicator may do so on his or her own motion based on information
23 identified through independent research.⁵

24 ~~Besides official notice, In addition, adjudicators independent research may sometimes,~~
25 ~~in appropriate circumstances, wish to used, for example, conduct independent research to[:]~~
26 learn background information in preparation for a hearing; ~~define the ordinary or technical~~
27 ~~meaning of terms; assess a party's or witness's credibility; determine an expert's~~
28 ~~qualifications; assess the reliability of an expert's opinion; or interpret or evaluate existing~~
29 evidence. The facts identified through independent research may be adjudicative (i.e., "the facts
30 of the particular case") or legislative (i.e., "those which have relevance to legal reasoning and the
31 lawmaking process").⁶

32 Congress, courts, agencies, and scholars have long debated the extent to which agency
33 adjudicators may and should conduct independent research.⁷ While some forms of independent
34 research are firmly rooted in longstanding agency practices, others have proven more
35 controversial in certain circumstances. The growth of the internet has amplified this debate in
36 recent years as adjudicators now have quicker and easier access to vastly greater amounts of
37 information.⁸ Information that is now available to adjudicators includes online versions of

⁴ 5 U.S.C. § 556(e) ~~(2019)~~; 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.6 (6th ed. 2019).

⁵ See *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n*, 301 U.S. 292, 300-06 (1937).

⁶ FED. R. EVID. 201(a) Advisory Committee Note.

⁷ See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 71-73 (1941); Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949).

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>.



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38 ~~traditional~~ print publications and public records, as well as newer forms of information such as
39 openly editable encyclopedias, blogs, social media, and personal and professional websites.

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

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

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

Commented [A3]: Clarify that this applies to independent research beyond official notice.

⁹ Ohio Bell Tel. Co., 301 U.S. at 300-06.

¹⁰ ~~HICKMAN & PIERCE, supra note 4, § 9.6.1.~~

¹¹ Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019); Louis J. Virelli III, *Recusal Rules for Administrative Adjudicators 7-8* (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

¹² See Recommendation 2018-4, *supra* note 11, ¶ 3.



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58 contrary.”¹³ Materials identified through independent research may be hearsay.¹⁴ Although
59 hearsay is generally admissible in administrative hearings “up to the point of relevancy,”¹⁵ the
60 APA specifies that a party is entitled to “conduct such cross-examination as may be required for
61 a full and true disclosure of the facts.”¹⁶ ~~[The APA also prohibits...APA prohibition on ALJ~~
62 ~~consulting on fact in issue. 554(d)(1)]~~ Unless an exception applies, the APA also prohibits an
63 employee who performed an investigative or prosecutorial function in a case from participating
64 or advising in the decision or review of the same or a factually related case except as a witness or
65 counsel.¹⁷ ~~Whether an act of independent research constitutes a prohibited investigation or~~
66 ~~prosecution may depend on the specific features of an agency’s proceedings.~~¹⁸

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

73 Because adjudications vary widely in their purpose, scope, complexity, and effects, a
74 ~~categorical one-size-fits-all~~ approach to independent research across federal adjudications is
75 neither practicable nor desirable. Some adjudications are adversarial; others are non-adversarial.
76 In some contexts, the government brings an action against a private party; in others, a private
77 party petitions the government, or the government resolves a dispute between private ~~or public~~
78 parties. Some agencies ~~have adopted apply~~ the *Federal Rules of Evidence*; ~~most~~ others have

¹³ 5 U.S.C. § 556(e) ~~(2019)~~.

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).

¹⁵ *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

¹⁶ 5 U.S.C. § 556(d) ~~(2019)~~.

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.



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79 developed evidentiary rules to suit their specific needs. Adjudicators in some contexts have an
80 affirmative duty to develop the record or assist unrepresented parties; adjudicators in other
81 contexts have no such obligation. Some adjudicators play an active role questioning parties and
82 witnesses and calling experts; others do not. Adjudicators vary in the degree to which they are
83 viewed as subject-matter experts and the extent to which they have access to the expertise of
84 agency policy ~~makers-makers~~.

85 This recommendation encourages agencies that conduct adjudications involving a legally
86 required evidentiary hearing to develop appropriate ~~rules-policies~~ on independent research. The
87 ~~rules-policies~~ could take different forms depending on the circumstances.⁴⁹ [In some
88 circumstances, an agency may consider publishing a legislative rule (which generally requires an
89 agency to solicit public comment) or a rule of agency organization, procedure, or practice (which
90 does not). In other circumstances, an agency pronouncement that is categorized as a “guidance
91 document,” including an interpretative rule or general statement of policy, may be suitable.] The
92 appropriate form of an agency’s ~~rule-policy~~ on independent research will depend on ~~the-its rule’s~~
93 substance and intended effect and on the unique circumstances of the agency’s adjudicatory
94 ~~program~~.

95 Although the emphasis of this recommendation is the particular phenomenon of
96 independent internet research, its recommended best practices apply equally to independently
97 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. Given the possibility that independent
research, especially that conducted on the internet, could result in actual or perceived bias or~~

⁴⁹ See 5 C.F.R. U.S.C. § 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”).

Commented [A4]: Cite ACUS recommendations on guidance documents.



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~~result in errors or inefficiencies, agencies should. 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 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;~~~~



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122 ~~e. Whether it will be difficult or excessively time consuming for adjudicators or~~
123 ~~adjudicative staff to establish the authenticity and reliability of information for~~
124 ~~which independent research is being conducted;~~

125 ~~d. Whether an adjudicator can more accurately obtain the desired information from~~
126 ~~the parties or from an expert witness;~~

127 ~~e. Whether independent research will reopen a closed administrative record or~~
128 ~~require a supplemental hearing.~~

Developing Rules and Procedures for Independent Research.

129 1. If agencies identify reliable sources or categories of sources that it determines would be
130 generally appropriate for adjudicators to independently consult, they should ~~publish rules~~
131 ~~that publicly identify designate the those~~ sources or categories of sources ~~and state that~~
132 ~~adjudicators may independently consult them for purposes of an adjudication.~~

133 2. These rules should clarify whether adjudicators may consult other, unenumerated
134 resources related to the subject. If agencies' rules permit adjudicators to independently
135 consult sources that are not specifically designated in an agency rule, they should
136 consider publishing rules policies to help adjudicators assess the authenticity and
137 reliability of internet information. Agencies should consider including at least the
138 following indicia of authenticity and reliability, particularly with respect to internet
139 information: in such rules:

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

143 b. Whether the author published the information for a purely informational or
144 scholarly purpose (i.e., not for other than commercial, partisan, or promotional
145 purposes commerce, advocacy, or promotion);

146 ~~Whether the author developed the information according to a sound methodology;~~

147 c. Whether the information references other authorities which help to corroborate its
148 accuracy;



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- 149 d. Whether the meaning and significance of the information is clear ~~and not~~
150 ~~susceptible to misinterpretation;~~
- 151 e. Whether the information is published in a final format rather than a
152 ~~continuously draft or a publicly or openly~~ editable format;
- 153 f. Whether the information ~~remains~~ is current;
154 ~~Whether the information has been available for a long enough period to allow~~
155 ~~erroneous information to be corrected or potentially misleading information to be~~
156 ~~contextualized;~~
- 157 g. Whether the ~~owner or administrator of the website on which~~ ~~owner or~~
158 ~~administrator of the website on which~~ the information appears is easily
159 authenticated, is a recognized authority or resource, and maintains the website for
160 a purely informational or scholarly purpose (i.e., not for commercial, partisan, or
161 promotional purposes) ~~a purpose other than commerce, advocacy, or promotion;~~
- 162 h. Whether information that appears on the website ~~or in the publication~~ undergoes
163 editorial or peer review; ~~and~~
164 ~~Whether the information is of a type that ordinarily appears on the website or~~
165 ~~other, similar websites; and~~
- 166 i. Whether other ~~reliable~~ resources ~~characterized by sufficient indicia of reliability~~
167 contain the same information or cite to the original information as reliable or
168 authoritative.

169 ~~4.3.~~

170 ~~5.4.~~ Agencies should promulgate rules on official notice. They should specify the procedures
171 that an adjudicator must follow when an agency decision rests on official notice of a
172 material fact and ensure that parties, in appropriate circumstances and upon timely
173 request, are provided a reasonable opportunity to rebut the fact; rebut an inference drawn
174 from the fact; and supplement, explain, or give different perspective to the fact. The
175 precise nature of an opportunity for rebuttal may depend on factors such as whether a fact
176 is general or specific to the parties, whether a fact is reasonably disputable or



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177 indisputable, whether a fact is central or peripheral to the adjudication, and whether a
178 decision represents an initial or a final action of an agency.

179 ~~6.5~~ If agencies intend that specific procedures will apply when adjudicators use
180 independently obtained information for purposes other than official notice of a material
181 fact, they should publish rules that clarify the distinction between official notice and other
182 uses of information independently obtained by an adjudicator and describe the applicable
183 procedures, if any. In particular, agencies should consider distinguishing, as appropriate,
184 legal research from factual research; and material facts from facts that are not material,
185 such as background facts.

186 ~~7.6~~ Agency rules on independent research should specify when adjudicators must physically
187 or electronically put independently obtained materials, especially internet materials, in an
188 administrative record and explain what procedures adjudicators should follow to do so to
189 ensure they preserve evidence in a stable, permanent form.

190 ~~8.1~~ If agencies' rules permit adjudicators to independently consult sources that are not
191 specifically designated in an agency rule, they should consider publishing rules to help
192 adjudicators assess the authenticity and reliability of internet information. Agencies
193 should consider including at least the following indicia of authenticity and reliability in
194 such rules:

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

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

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

201 ~~d.a.~~ Whether the information references other authorities which help to corroborate its
202 accuracy;

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



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- 205 ~~f.a. Whether the information is published in a final format rather than a continuously~~
206 ~~or openly editable format;~~
- 207 ~~g.a. Whether the information remains current;~~
- 208 ~~h.a. Whether the information has been available for a long enough period to allow~~
209 ~~erroneous information to be corrected or potentially misleading information to be~~
210 ~~contextualized;~~
- 211 ~~i.a. Whether the owner or administrator of the website on which the information~~
212 ~~appears is easily authenticated, is a recognized authority or resource, and~~
213 ~~maintains the website for a purpose other than commerce, advocacy, or~~
214 ~~promotion;~~
- 215 ~~j.a. Whether information that appears on the website undergoes editorial or peer~~
216 ~~review;~~
- 217 ~~k.a. Whether the information is of a type that ordinarily appears on the website or~~
218 ~~other, similar websites; and~~
- 219 ~~l.a. Whether other resources characterized by sufficient indicia of reliability contain~~
220 ~~the same information or cite to the original information as reliable or~~
221 ~~authoritative.~~

Providing Access to Sources Used for Independent Research

222 ~~9.7.~~ When an agency rule designates a source that is appropriate for independent research, the
223 agency should consider clearly identifying and providing access to the source on its
224 website. Agencies should ensure that all sources that they host on their websites are kept
225 up to date. If agencies provide hyperlinks to sources that are hosted on websites not



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226 maintained by the agency, they should ensure that both the hyperlinks on their own
227 websites and the materials on third-party sites remain current and accurate.

228 ~~10.8.~~ 11.8. When agencies provide access to sources on their websites or on a third-party
229 website, they should include a plain-language statement that clearly explains how
230 adjudicators and parties may use the information contained in those sources.

231 ~~11.9.~~ 11.9. If an adjudicator intends to rely on an independently obtained source that is not
232 available to the parties on or through an agency website, the adjudicator should ensure
233 that the parties have reasonable access to the source or to a relevant excerpt from the
234 source.