



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023-1

Proactive Disclosure of Agency Legal Materials

Adopted June 15, 2023

Agencies produce many kinds of legal materials—that is, documents that establish, interpret, apply, explain, or address the enforcement of legal rights and obligations, along with constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials come in many forms, ranging from generally applicable rules to orders issued in the adjudication of individual cases. Many statutes govern the public disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to proactively disclose certain materials, either by publishing them in the *Federal Register* or posting them on their websites. Other materials must be made available upon request. Some materials, based on their nature or content, are exempt from disclosure.

Since its establishment, the Administrative Conference has adopted dozens of recommendations encouraging agencies to proactively disclose important legal materials, even beyond what the law currently requires, and to make them publicly available in a readily accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress could implement through legislative action.

¹ Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Disclosure of Agency Legal Materials 5* (May 30, 2023) (report to the Admin. Conf. of the U.S.).

² 5 U.S.C. § 552.

³ 41 U.S.C. ch. 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ Recommendations adopted in recent years include: Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of*



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Considering the principal statutes governing the disclosure of agency legal materials, the Conference has also identified problems—inconsistencies and uncertainties, for example—that Congress should remedy through statutory reforms. Developed at different times and for different purposes, these statutes contain overlapping requirements that are sometimes difficult to harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from 1935—and technological developments and organizational changes have rendered certain provisions outdated. Some statutory provisions are vague, which has led to litigation over their meaning and to differing agency practices.⁶

To ensure that agencies provide ready public access to important legal materials in the most efficient manner, this Recommendation identifies several statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish in the *Federal Register*, post on their websites, or otherwise proactively disclose. The Conference recognizes that these statutory reforms would impose additional initial and ongoing costs on agencies. At the same time, proactive disclosure of agency legal materials may save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests. In assigning responsibilities for overseeing the development and implementation of the proactive disclosure plans and for overseeing the agency's compliance with all legal requirements for the proactive disclosure of agency legal materials, agencies may wish to consider existing officials and the potential for overlapping or shared responsibilities.⁷

This Recommendation should not be considered as an exhaustive catalog of useful reforms. For example, it does not address whether the exemptions from FOIA's general disclosure requirements⁸ should be amended or recommend actions that may be at odds with FOIA. The statutory reforms proposed in this Recommendation therefore would not require

Policies Governing Agency Adjudicators, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

⁶ See generally Bell et al., *supra* note 1.

⁷ For example, 5 U.S.C. § 552(j) requires agencies to designate a Chief FOIA Officer.

⁸ 5 U.S.C. § 552(b).



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agencies to proactively disclose matters exempted or excluded from FOIA’s general disclosure requirements, including “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” Congress should also consider timeframes for implementation of the proactive disclosure recommendations, whether for newly created or preexisting agency legal materials.

Nothing in this Recommendation should be interpreted to constitute the Conference’s interpretation of the statutes governing the disclosure of agency legal materials. Any recommendation that a statutory provision be amended to “provide” something does not necessarily mean that the law does not already require it. Nor should this Recommendation be read as superseding the Conference’s many previous recommendations on the disclosure of agency legal materials. In the absence of congressional action, the Conference encourages agencies to adopt the best practices identified in this Recommendation and its many previous recommendations.

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

1. Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that each agency make available on its website:
 - a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C. §§ 554 and 556–557 or otherwise issued after a legally required opportunity for an evidentiary hearing. Each agency should proactively disclose any such opinion or order regardless of whether the agency designates the opinion or order as precedential, published, or other similar designation;
 - b. Written documents that communicate to a member of the public the agency’s decision not to enforce a legal requirement against an individual or entity. Such documents may include decisions to grant an individual or entity a waiver or exemption, and advisory opinions that apply generally applicable legal requirements to specific facts or explain how the agency will exercise its discretion in particular cases;



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- c. Written legally binding opinions and memoranda issued by or under the authority of its chief legal officers;
 - d. Settlement agreements to which the agency is a party;
 - e. Memoranda of understanding, memoranda of agreement, and other similar inter-agency or inter-governmental agreements that affect a member of the public;
 - f. Any operative agency delegations of legal authority;
 - g. Any operative orders of succession for agency positions whose occupants must be appointed by the President with the advice and consent of the Senate; and
 - h. Any statutory or agency designations of first assistant positions to positions whose occupants must be appointed by the President with the advice and consent of the Senate.
2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations providing that it will not proactively disclose some records described in Paragraph 1 of this Recommendation, and subject to the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), because individual records in the relevant category do not vary considerably in terms of their factual contexts or the legal issues they raise, or that proactive disclosure of such documents would be misleading. Any such rule should explain which records the agency will not proactively disclose and what other information (e.g., aggregate data, representative samples), if any, the agency will proactively disclose instead to adequately inform the public about agency activities.
3. Congress should provide a mechanism for ensuring that agencies:
 - a. Develop and post disclosure plans—internal management plans and procedures for making legal materials available online on their websites; and
 - b. Designate an officer or officers responsible for overseeing the development and implementation of the proactive disclosure plans described in Paragraph 3(a), and for overseeing the agency's compliance with all legal requirements for the proactive disclosure of agency legal materials.
4. Because various provisions of the E-Government Act, Pub. L. No. 107-347, governing proactive disclosure are duplicative, contain drafting errors, or are outdated, Congress should amend the statute to:



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- a. Delete § 206(b);
 - b. Delete “and (b)” in § 207(f)(1)(A)(ii); and
 - c. Eliminate references to the Interagency Committee on Government Information, which no longer exists. Congress should instead require that the Office of Management and Budget, after consultation with other relevant inter-agency bodies, periodically update its guidance on federal agency public websites to ensure that agencies present legal materials, required to be disclosed proactively, on their websites in a clear, logical, and readily accessible fashion.
5. Congress should provide that each agency should post each of its legislative rules, or a link to those rules, on its website, and should, to the extent feasible, include links to related agency legal materials, such as preambles and other guidance documents explaining the rule or significant adjudicative opinions interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

6. Congress should provide that a person may use the process described in 5 U.S.C. § 552(a)(3) to request that an agency proactively disclose certain records when the requestor alleges the agency is legally required to proactively disclose the records but has not done so.
7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an agency has not proactively disclosed records when legally required to do so, the reviewing court may order the agency to make them available to the general public in the manner required by the proactive disclosure provisions of 5 U.S.C. § 552(a). Congress should also provide that a requester must exhaust administrative remedies required by 5 U.S.C. § 552 before filing a complaint in district court to compel an agency to proactively disclose records.

Preparation of Proposed Legislation

8. The Conference’s Office of the Chair should prepare and submit to Congress proposed statutory changes consistent with this Recommendation.