



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adjudication Materials on Agency Websites

Committee on Administration and Management

Proposed Recommendation | June 16, 2017

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council members and Conference members (with sources shown in the margin).

1 In contrast to federal court records, which are available for download from the judiciary's
2 Public Access to Court Electronic Records (PACER) program (for a fee), or records produced
3 during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking
4 website www.regulations.gov, there exists no single, comprehensive online clearinghouse for the
5 public hosting of decisions and other materials generated throughout the course of federal
6 administrative adjudication.¹ Instead, to the extent a particular adjudication record is digitally
7 available, it is likely to be found on the relevant agency's website.

8 Federal administrative adjudication² affects an enormous number of individuals and
9 businesses engaged in a range of regulated activities or dependent on any of the several
10 government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions,

¹ The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will consider whether the issue merits attention in the future. In the meantime, the research underlying this recommendation is limited to an examination of agencies' existing websites.

² This recommendation is confined to records issued or filed in adjudicative proceedings that are based on oral or written hearings in which one or more parties have an opportunity to introduce evidence or make arguments. The preamble to Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016), refers to such proceedings as either "Type A" or "Type B" adjudication. Type A adjudication consists of proceedings that are regulated by the procedural provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-559, and are commonly referred to as "formal adjudication." Type B adjudicative proceedings, while not regulated by the APA's adjudication provisions, are nonetheless subject to legally required evidentiary hearings. Type B proceedings are, along with what the preamble terms "Type C adjudication" (proceedings not subject to legally required evidentiary hearings), commonly referred to as "informal adjudication."



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11 and other records generated by agencies and parties involved in adjudication bespeak the
12 procedural complexities and sophistication of many proceedings. ~~Insofar as adjudicative~~
13 ~~proceedings encompass the application of federal power in the disposition of disputes involving~~
14 ~~private parties, the records associated with such proceedings are of public importance. Further,~~
15 ~~administrative adjudication records can serve as ready-made models for private parties~~
16 ~~(especially those who are self-represented)² in drafting their own materials and may provide~~
17 ~~insight into the laws and procedures governing proceedings.~~

18 Many federal laws and directives mandate or encourage the online disclosure of
19 important government materials, including certain adjudication records. The Freedom of
20 Information Act (FOIA) requires that agencies ~~electronically disclose~~ **make available in an**
21 **electronic format** “final opinions, including concurring and dissenting opinions, as well as
22 orders, made in the adjudication of cases.”⁴ The prevailing interpretation of this provision limits
23 its ambit to “precedential” decisions.⁵ Nonetheless, other laws and policies, including most
24 recently the FOIA Improvement Act of 2016,⁶ encourage more expansive online disclosure of
25 federal records.⁷

26 ~~Insofar as adjudicative proceedings encompass the application of federal power in the~~
27 ~~disposition of disputes involving private parties, the records associated with such proceedings are~~
28 ~~of public importance. When, as is often the case, adjudicative proceedings involve the application~~
29 ~~of governmental power to resolve disputes involving private parties, the associated records are of~~

²The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. See Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

⁴ 5 U.S.C. § 552(a)(2)(A).

⁵ See U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967); U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.).

⁶ Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies’ records management programs provide “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” *Id.* § 3102(2).

⁷ See, e.g., Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish “public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely”).

Commented [CMA1]: Proposed amendment from Michael Herz.

Explanation: Lines 12 through 17 beginning at “Insofar” moved to paragraph beginning at line 26.



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30 public importance. Further, administrative adjudication records can serve as ready-made models
31 for private parties (especially those who are self-represented)⁸ in drafting their own materials and
32 may provide insight into the laws and procedures governing proceedings relevant substantive law
33 and procedural requirements, whether in the form of Easy availability of these materials can save
34 staff time or money saved through a reduction in the volume of FOIA requests or printing costs,
35 or an increase in the speed with which agency staff will be able to respond to remaining FOIA
36 requests. In addition, there may also be more intangible benefits engendered by increased public
37 trust and stakeholder website user satisfaction.

Commented [CMA2]: Proposed amendment from Michael Herz.

Explanation: Composed of language originally located at lines 12 through 17 (beginning at “Insofar”) and lines 55 through 59 (beginning at “whether”), with changes to the original language.

38 In the absence of a comprehensive, government-wide platform akin to PACER or
39 www.regulations.gov, agencies generally rely on their individual websites to comply with online
40 transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases,
41 supporting records produced during adjudicative proceedings. Some agencies host relatively
42 accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all
43 agency websites, however, are equally navigable or robust. Additionally, in providing online
44 access to adjudication materials, agencies utilize navigational and organizational tools and
45 techniques in various ways.

46 This recommendation offers best practices and factors for agencies to consider as they
47 seek to increase the accessibility of adjudication materials on their websites and maintain
48 comprehensive, representative online collections of adjudication materials, consistent with a
49 balancing of the transparency objectives and privacy considerations of FOIA and other relevant
50 laws and directives.⁹ It is offered drafted with the knowledge recognition that all agencies are
51 subject to unique programming stakeholder and financial constraints, and that the
52 distinctiveness of agencies’ adjudicative schemes limits the development of workable
53 standardized practices. To the extent agencies are required to expend additional resources in

⁸ The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. See Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

⁹ For the report undergirding this recommendation, see Daniel J. Sheffner, Adjudication Materials on Agency Websites (April 10, 2017) (report to the Admin. Conf. of the U.S.), available at <https://www.acus.gov/report/adjudication-materials-agency-websites-final-report-0>.



54 implementing this recommendation, any upfront costs incurred may be accompanied by
 55 offsetting tangible benefits, ~~whether in the form of staff time or money saved through a~~
 56 ~~reduction in the volume of FOIA requests or printing costs, or an increase in the speed with~~
 57 ~~which agency staff will be able to respond to remaining FOIA requests. In addition, there may~~
 58 ~~also be more intangible benefits engendered by increased public trust and stakeholder~~
 59 ~~satisfaction.~~

Commented [CMA3]: Proposed amendment from Michael Herz.
Explanation: Lines 55 through 59 beginning at “whether” moved above to lines 33 through 37.

RECOMMENDATION

Disclosure of Adjudication Materials

- 60 1. Agencies should consider ~~maintaining links on their websites to copies of providing free~~
 61 ~~access on their websites to~~ all decisions and supporting materials (e.g., pleadings, motions,
 62 briefs) issued and filed in adjudicative proceedings in excess of the **affirmative** disclosure
 63 requirements of the Freedom of Information Act, subject to relevant law. In determining
 64 which materials to disclose, agencies should ~~take into account ensure that they have~~
 65 ~~implemented appropriate safeguards to protect the privacy interests of individuals and~~
 66 ~~entities that are the subject of adjudication materials. Agencies should also consider the~~
 67 following factors **in deciding what to disclose:**
 68 a. the interests of the public ~~and relevant stakeholders~~ in gaining insight into the
 69 agency’s ~~internal adjudicatory~~ processes;
 70 b. the costs to the agency in disclosing adjudication materials in excess of the Freedom
 71 of Information Act’s requirements;
 72 c. any offsetting benefits the agency may realize in disclosing these materials; **and**
 73 ~~d. the privacy interests of individuals and entities that are the subject of adjudication~~
 74 ~~materials; and~~
 75 **e.d.** any other relevant considerations, such as agency-specific adjudicative practices.
 76 2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of
 77 their factual contexts or the legal analyses employed in their dispositions should consider
 78 disclosing ~~materials from representative examples of cases on their websites on their websites~~
 79 ~~a representative sampling of actual cases and associated adjudicative materials.~~

Commented [CMA4]: Proposed amendment from Michael Herz.
Explanation: “This proposal is in part stylistic. The substantive change is to specify that these materials should be available free of charge. This is implicit in the preamble and recommendation as written, so this might be seen as clarifying rather than substantive. But I think it is worth making explicit because, as the preamble explains, there are two models out there, PACER and regulations.gov. One of their huge differences is that regulations.gov is free and PACER is not. That really matters in terms of the practical availability of the materials.”

Commented [CA5]: Proposed amendment from Council.

Commented [CA6]: Proposed amendment from Council.



Access to Adjudication Materials

- 80 3. Agencies that choose to post all or nearly all decisions and supporting materials filed in
81 adjudicative proceedings should endeavor to group materials from the same proceedings
82 together, for example, by including a separate docket page for each adjudication.
83 4. Subject to considerations of cost, a agencies should endeavor to ensure that visitors to their
84 websites website users are able to easily locate adjudication materials by:
85 a. displaying links to agency adjudication sections in easily accessible locations on the
86 website
87 a-b. as well as by maintaining a search engine and a site map or index, or both, on or
88 locatable from the homepage;
89 b-c. offering relevant filtering and advanced search options in conjunction with their main
90 search engines that allow users to identify specify with greater detail the records or
91 types of records for which they are looking, such as options to sort, narrow, or filter
92 searches by record type, action or case type, date, case number, party, or specific
93 words or phrases; and
94 e-d. offering general and advanced search and filtering options specifically within the
95 sections of their websites that disclose adjudication materials to sort, narrow, or filter
96 searches by the ways suggested in subparagraph (b).

Commented [CMA7]: Proposed amendment from Michael Herz.

Commented [CA8]: Proposed amendment from Council.