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).

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

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

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

Many federal laws and directives mandate or encourage the online disclosure of important government materials, including certain adjudication records. The Freedom of Information Act (FOIA) requires that agencies electronically disclose “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.” The prevailing interpretation of this provision limits its ambit to “precedential” decisions. Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of 2016, encourage more expansive online disclosure of federal records.

Commented [CMA1]: Proposed amendment from Michael Herz.
Explanation: Lines 12 through 17 at “Insofar” moved to paragraph beginning at line 26.


7. 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.).

8. 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).

9. 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”).
public importance. Further, administrative adjudication records can serve as ready-made models for private parties (especially those who are self-represented)\(^8\) in drafting their own materials and may provide insight into the laws and procedures governing proceedings, relevant substantive law and procedural requirements, whether in the form of. Easy availability of these materials can save staff time or money saved 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 addition, there may also be more intangible benefits engendered by increased public trust and stakeholder website user satisfaction.

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

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

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implementing this recommendation, any upfront costs incurred may be accompanied by
offsetting tangible benefits—whether in the form of staff time or money saved 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 addition, there may
also be more intangible benefits engendered by increased public trust and stakeholder
satisfaction.

RECOMMENDATION

Disclosure of Adjudication Materials

1. Agencies should consider maintaining links on their websites to copies of providing free
access on their websites to all decisions and supporting materials (e.g., pleadings, motions,
b Briefs) issued and filed in adjudicative proceedings in excess of the affirmative disclosure
requirements of the Freedom of Information Act, subject to relevant law. In determining
which materials to disclose, agencies should take into account that they have implemented appropriate safeguards to protect the privacy interests of individuals and
entities that are the subject of adjudication materials. Agencies should also consider the
following factors in deciding what to disclose:
   a. the interests of the public and relevant stakeholders in gaining insight into the
      agency’s internal adjudicatory processes;
   b. the costs to the agency in disclosing adjudication materials in excess of the Freedom
      of Information Act’s requirements;
   c. any offsetting benefits the agency may realize in disclosing these materials; and
   d. the privacy interests of individuals and entities that are the subject of adjudication
      materials; and
   e. any other relevant considerations, such as agency-specific adjudicative practices.

2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of
their factual contexts or the legal analyses employed in their dispositions should consider
disclosing materials from representative examples of cases on their websites.

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

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 [CAS]: Proposed amendment from Council.

Commented [CA6]: Proposed amendment from Council.
Access to Adjudication Materials

3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should endeavor to group materials from the same proceedings together, for example, by including a separate docket page for each adjudication.

4. Subject to considerations of cost, agencies should endeavor to ensure that visitors to their websites are able to easily locate adjudication materials by:

   a. displaying links to agency adjudication sections in easily accessible locations on the website;

   b. as well as by maintaining a search engine and a site map or index, or both, on or locatable from the homepage;

   c. offering relevant filtering and advanced search options in conjunction with their main search engines that allow users to identify specific types of records for which they are looking, such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases; and

   d. offering general and advanced search and filtering options specifically within the sections of their websites that disclose adjudication materials to sort, narrow, or filter searches by the ways suggested in subparagraph (b).