Administrative Conference of the United States

ADJUDICATION MATERIALS ON AGENCY WEBSITES

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INTRODUCTION

This report examines the dissemination on agency websites of decisions and supporting materials issued and filed in federal adjudicative proceedings. In contrast to notice-and-comment rulemaking, which is supported by a fully digitized platform that allows members of the public to post comments to proposed rules and view materials contained in rulemaking dockets,[1] there exists no single, comprehensive online clearinghouse for the public hosting of adjudication decisions and supporting materials. Instead, to the extent that a particular adjudication record is digitally available, it is likely to be found on the relevant agency's website.

In my personal experience searching for adjudication materials on agency websites, as well as in the experiences of several of my colleagues on the Administrative Conference staff, agency websites have varied considerably in terms of their general navigability and the comprehensiveness of their collections of adjudication materials. In order to form a clearer picture of agency practices, I surveyed the websites of 24 agencies that engage in adjudication and assessed the degree to which each maintained accessible, comprehensive collections of adjudication materials. From this examination, as well as from telephone and e-mail conversations with personnel from three agencies that maintain comprehensive or near-comprehensive collections of adjudication materials, and case studies of three representative websites, I formulated recommendations to agencies for improving the availability and accessibility of adjudication materials on their websites.

The report proceeds as follows. Part I provides an overview of federal administrative adjudication and the laws and policies relevant to the online disclosure of adjudication materials. Part II discusses the 24-website survey and presents its results. Part III analyzes the survey's findings, dividing the analysis into two sections. The first section discusses the degree of accessibility of adjudication materials on agency websites by assessing the general ease of navigating to adjudication materials on the surveyed websites. The second section discusses the general disclosure practices of agency websites. Part III also relays key points derived from telephone and e-mail discussions with personnel from the Federal Maritime Commission, Consumer Product Safety Commission, and National Labor Relations Board. These three agencies maintain comprehensive or near-comprehensive collections of adjudication decisions and supporting materials on their websites. In speaking with personnel familiar with these agencies' online disclosure practices, I sought to determine whether agencies that do not maintain as robust online adjudication sections could possibly replicate the aforementioned agencies' successes.

Part IV presents brief case studies of the Federal Trade Commission, Federal Mine Safety & Health Review Commission, and Social Security Administration's websites. These websites, each of which sits on a different point on the continuum of comprehensiveness and navigability that was revealed during this study, are helpful in understanding the general range of agency practices. Lastly, Part V offers recommendations for agencies to increase the accessibility of

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[1] *See* REGULATIONS.GOV (last visited Jan. 24, 2017), https://www.regulations.gov/. *Regulations.gov* is discussed in Part I.A, *infra*.

adjudication materials on their websites and maintain more comprehensive collections of adjudication materials.

I. BACKGROUND

A. Federal Administrative Adjudication and Electronic Access to Adjudication Materials

Federal administrative adjudication broadly consists of two types: proceedings conducted pursuant to the Administrative Procedure Act (APA),[2] and the residuum of adjudicative proceedings subject to the procedural requirements of other statutes or sources of law.[3] If an agency's organic statute requires a hearing "on the record after opportunity for an agency hearing,"[4] then the APA's formal hearing provisions[5] apply.[6] APA hearings are trial-type, evidentiary hearings over which impartial adjudicators—generally administrative law judges (ALJs)—preside.[7] Parties may submit documentary evidence or live testimony and conduct cross-examination.[8] Following the hearing, the adjudicator issues a decision in the form of "a statement of . . . findings and conclusions" akin to a judicial opinion.[9]

Non-APA adjudications encompass all adjudicatory proceedings not governed by the APA's hearing provisions. External sources of law, generally an agency's organic statute, determine the procedural requirements of non-APA adjudicatory proceedings, subject to certain baseline requirements imposed by 5 U.S.C. §§ 555 and 558 and due process.[10] Non-APA adjudication schemes vary substantially, ranging from "semi-formal"[11] proceedings that, like APA

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[2] 5 U.S.C. § 551 *et seq.*

[3] *See* AMERICAN BAR ASSOCIATION, A BLACK LETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 18-19 (2d ed. 2013). APA and non-APA adjudications are commonly referred to as "formal" and "informal" adjudications, respectively.

[4] 5 U.S.C. § 554(a).

[5] *Id.* §§ 554, 556, 557.

[6] U.S. v. Florida E. C. R. Co., 410 U.S. 224 (1973). An agency's governing statute may also explicitly designate proceedings as APA adjudications. If a statute is ambiguous, the agency's reasonable interpretation governs. *See* Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 18-19 (1st Cir. 2006); *see also* Office of the Chairman, Admin. Conf. of the U.S., Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 13 n.82 (March 31, 2014) (noting that "courts generally defer to an agency's interpretation as to the application of the APA's formal adjudication provisions.") (citing *Dominion*, 443 F.3d 12).

[7] The APA refers to adjudicators who preside over APA hearings as "presiding employees." 5 U.S.C. § 556(b). The presiding employee could be "the agency," "one or more members of the body which comprises the agency," or "one or more [ALJs] appointed under section 3105 of this title." *Id.* § 556(b)(1)–(3).

[8] *Id.* § 556(d).

[9] *Id.* § 557(c)(3)(A).

[10] Section 555 authorizes, among other things, representation by counsel and the acquisition of hearing transcripts. *Id.* § 555. Section 558 sets out certain requirements applicable to licensing proceedings, and requires that sanctions and orders be legally authorized. *Id.* § 558. All adjudicatory proceedings must comply with procedural due process. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

[11] *See* Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts–Except When They're Not*, 59 ADMIN. L. REV. 79, 99 (2007) (referring to non-APA adjudications governed by "formal" procedural requirements as "semi-formal" proceedings). Michael Asimow designates non-APA proceedings subject to evidentiary hearing requirements as "Type B" adjudications to more clearly differentiate them from APA hearings ("Type A") and informal proceedings that do not require evidentiary hearings ("Type C"). *See* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 1 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.) [hereinafter Asimow, Evidentiary Hearings].

hearings, are conducted pursuant to procedurally robust evidentiary procedures, to those, like tariff classification rulings, that are non-adversarial and procedurally bare.[12] These types of hearings are presided over by many different types of adjudicators, some of whom are called "administrative judges" (AJs).

Agency adjudications affect 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, pleadings, motions, briefs, petitions, discovery materials, and other records generated by agencies and parties involved in formal and semi-formal adjudications bespeak not only the proceedings' procedural complexities and sophistication, but also the parties' acknowledgment of their consequential natures. Whether, for example, an individual qualifies for disability benefits, companies holding significant shares of a market are prohibited from merging, or a business is fined for violating environmental regulations profoundly affects the parties involved and third parties not subject to the proceedings.

Given the importance of federal administrative adjudication, the materials generated throughout the course of any given adjudicatory proceeding—the aforementioned orders, pleadings, briefs, and other adjudication records—take on special significance. Insofar as adjudicative proceedings involve the application of federal power by unelected officials in the disposition of disputes between the government and private parties, or among private parties, the records associated with such proceedings are of immense public importance. On a more practical level, administrative adjudication documents can serve as ready-made models for private parties (especially those who are self-represented)[13] in drafting their own materials, and may provide insight into the laws and procedures governing proceedings.

The rapid growth of information technologies in the 1990s ushered in a new epoch in the history of government transparency initiatives.[14] As if overnight, the Internet opened up seemingly limitless opportunities for the federal government to acquire and disseminate information on a mass scale.[15] Although the government has generally been successful in utilizing the Internet to increase public access to important government information, adjudication materials have remained comparatively unaffected by such initiatives.[16] For instance, the federal judiciary has arguably become the most transparent body of courts in the world due to its Public Access to Court

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[12] Michael Asimow, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1006 (2004).

[13] For a recent study of self-represented parties in adjudicative proceedings, see Connie Vogelmann, Self-Represented Parties in Administrative Hearings (Oct. 28, 2016) (report to the Admin. Conf. of the U.S.). The report undergirded the Administrative Conference's recent recommendation of the same name, Recommendation 2016-6, Self-Represented Parties in Administrative Proceedings, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

[14] Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 91 (2012).

[15] *See* DARRELL M. WEST, DIGITAL GOVERNMENT 3 (2005) (noting that agencies soon realized that "[i]nformation and services could be put online and made available to a wide variety of people."); Shkabatur, *supra* note 14, at 91 (remarking that "[s]cholars have celebrated the potential of the Internet to open new channels of communication between citizens and the government, overcome agencies' resistance to exposure, and begin a new chapter in the long story of regulatory transparency and public accountability.").

[16] *See* Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 595-96 (2009).

Electronic Records (PACER) system.[17] PACER is an online database that provides access to PDF copies of most court records filed in the federal appellate, district, and bankruptcy courts nationwide. Whereas access to court documents once required an individual to physically visit the courthouse or place an order by mail, records may now be viewed online from a single source at the price of ten cents per page (but not to exceed $3.00 for a single record).[18] There exists no single, comprehensive hosting (and docketing) platform, however, for administrative adjudication materials.

A government initiative led by the Environmental Protection Agency and Office of Management & Budget (OMB) did conceive of an online clearinghouse that would provide public access to important administrative content, including adjudication materials.[19] Pursuant to the E-Government Act of 2002,[20] in 2003, the cross-agency eRulemaking Initiative launched *Regulations.gov*, a website dedicated to providing public access to regulatory materials and increasing public participation in the rulemaking process.[21] The website purports to provide access to "adjudications";[22] however, in truth only a small number of adjudicatory materials is available on the site.[23] *Regulations.gov*'s true utility is as a medium for public engagement in the informal rulemaking process.

In the absence of a comprehensive, government-wide hosting platform, individuals must visit federal agencies' websites to electronically access adjudication materials. Agency websites contain a host of information about individual agencies. As well as providing information on agencies' operations and activities, agency websites display many of the substantive legal documents agencies generate in furtherance of their lawmaking responsibilities, including the binding orders and, in some cases, supporting adjudication documents produced during the course

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[17] *See* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 484 (2009) ("This Article takes as its starting point the current state of the world's most transparent court system–the United States Courts as accessible through [PACER]."). *But see* Nat'l Veterans Legal Servs. Program v. United States, No. 16-745 (D. D.C. Jan. 24, 2017) (order granting motion for class certification in action against federal government alleging excessively high PACER fees).

[18] LoPucki, *supra* note 17, at 486; *see Electronic Public Access Fee Schedule*, PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (Dec. 1, 2013), https://www.pacer.gov/documents/epa_feesched.pdf.

[19] *The eRulemaking Initiative*, REGULATIONS.GOV (last visited Nov. 3, 2016), https:// www. regulations.gov/ aboutProgram.

[20] Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C.).

[21] A complementary site, *FDMS.gov*, allows agencies to manage the individual dockets made available on *Regulations.gov*. *See* FDMS.GOV (last visited Nov. 3, 2016), https://www.fdms.gov/fdms/login.do. "FDMS" stands for Federal Docket Management System, the management system used by both *Regulations.gov* and *FDMS.gov*.

[22] REGULATIONS.GOV (last visited Nov. 3, 2016), https://www.regulations.gov/.

[23] Most of the adjudicatory materials available on *Regulations.gov* are from the adjudication dockets of the Federal Motor Carrier Safety Administration. Several agencies were apparently opposed to moving their adjudication dockets to the FDMS system at its inception. *See* COMM. ON THE STATUS AND FUTURE OF FED. E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING, REPORT TO CONGRESS AND THE PRESIDENT, at 13 & n.15 (2008). This may be because the website was not actually designed with adjudication in mind. One agency official informed me that his agency frequently encounters processing delays and complications due to file-size limitations that are incompatible with the size of documents filed in his agency's enforcement proceedings. Email of Steve Farbman, Adjudications Counsel, Fed. Motor Carrier Safety Admin., Dept. of Transp., to Daniel Sheffner, Att'y Advisor, Admin. Conf. of the U.S. (Jan. 17, 2017, 10:47 a.m. EST) (on file with author). The official also noted that the website offers features that are irrelevant in the adjudicative context, such as links for posting comments. *Id.*

of adjudicative proceedings. Some agencies, such as the Environmental Protection Agency and the Federal Trade Commission, host relatively comprehensive adjudication dockets on their websites. Not all agency websites, however, are as robust. Many agency websites disclose only a limited number or type of adjudicatory materials, thus preventing access by citizens to certain government materials of public importance.

B. Laws and Policies Relevant to the Online Disclosure of Adjudication Materials

While the federal government has attempted to take advantage of advancements made in information technology since the Clinton Administration, only one statute, the Freedom of Information Act (FOIA),[24] imposes an explicit obligation on agencies to disclose certain adjudicatory materials online. On the other hand, several measures, such as the Federal Records Act (FRA),[25] Paperwork Reduction Act (PRA),[26] OMB Circular A-130, and the Obama Administration's open government policies, potentially encourage broader electronic dissemination of adjudicatory materials than is required by FOIA, although they fall short of actually or effectively mandating such disclosure.

The following is a brief overview of statutes and policies that are relevant to agencies' obligations to post adjudicatory materials on their websites, beginning with FOIA.

1. Freedom of Information Act

Section 3 of the original 1946 APA required that federal agencies "publish or . . . make available to public inspection all final opinions or orders in the adjudication of cases."[27] While section 3 was intended to "take the mystery out of administrative procedure"[28] by affording public access to significant agency materials,[29] the exploitation of the provision's capacious exceptions by agency officials ultimately rendered the provision a withholding, rather than disclosure statute.[30] FOIA, passed in 1966 by a Congress concerned with the development of "secret [agency] law,"[31] significantly amended section 3 by cabining its exceptions and broadening the types of materials subject to dissemination. Under the new disclosure law, codified at 5 U.S.C. § 552, final adjudicatory decisions, which it clarified as including concurring and dissenting opinions,[32] were required to be preserved in public "reading rooms" (a non-statutory term).[33] Agencies were prohibited from relying on or using as precedent final decisions that were not

[24] Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended in 5 U.S.C. § 552).
[25] Pub. L. No. 81-754, 64 Stat. 578 (1950) (codified as amended in 44 U.S.C. § 3101 *et seq.*).
[26] Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended in 44 U.S.C. § 3501 *et seq.*).
[27] 5 U.S.C. § 1002(b) (amended by Pub. L. No. 89-487, 80 Stat. 250 (1966)). Section 3 also mandated publication in the *Federal Register* of certain materials, including substantive agency rules and organizational and operational information, as well as the disclosure, subject to exception, of "matters of official record." *Id.* § 1002(a), (c).
[28] S. REP. No. 79-752, at 198 (1945).
[29] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 17 (1947).
[30] S. REP. No. 89-813, at 5 (1965).
[31] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (FOIA's affirmative disclosure provisions "represent[] a strong congressional aversion to "secret [agency] law") (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967)).
[32] 5 U.S.C. § 552(a)(2)(A).
[33] *Id.* § 552(a)(2); *see* Herz, *supra* note 16, at 586.

indexed and made available in reading rooms, unless they were promptly published and copies were offered for sale.[34]

By the mid-1990s, the Internet had become an increasingly sophisticated and important medium of communication. FOIA, whose passage preceded the advent of the Internet, had not kept pace with the technological advancements of the following three decades. Acknowledging that the disclosure law was in need of modernization, Congress passed and President Clinton signed into law the Electronic Freedom of Information Act Amendments of 1996 (EFOIA).[35] Pursuant to EFOIA, final adjudicatory opinions and orders generated on or after November 1, 1996, must be made available "by electronic means"[36]—that is, online.[37] FOIA's original brick and mortar reading rooms are located in Washington, D.C. Access to final agency opinions and orders prior to EFOIA's enactment, therefore, had necessitated not only some level of sophistication, but also, for most individuals, a substantial investment of time and money in the form of out-of-town travel.[38] By requiring that all subsequently issued final decisions be posted on agency websites (i.e., "electronic reading rooms"), EFOIA significantly eased citizen access to such materials.

While FOIA, after the 1996 amendments, obligates agencies to affirmatively disseminate certain adjudicatory materials online, the statute is clearly limited in scope. By its terms, the statute's proactive disclosure provision only applies to opinions and orders. FOIA does not require disclosure of the pleadings, motions, briefs, and other non-decisional materials associated with adjudication proceedings that are potentially just as useful in shining light on "secret [agency] law." Further, the proactive disclosure provision does not apply to all adjudicatory decisions. Due to the impracticability of indexing and disclosing in physical reading rooms all decisions issued by an agency, the Attorney General originally interpreted the provision as only applying to decisions that have "precedential effect,"[39] and this remains the generally accepted standard.[40]

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[34] *See* 5 U.S.C. § 552(a)(2).
[35] Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552(a)); *see* S. REP. No. 104-272, at 5 (1996).
[36] 5 U.S.C. § 552(a)(2).
[37] *See* U.S. Dep't of Justice, *FOIA Update: Congress Enacts FOIA Amendments*, Vol. XVII, No. 4. (Jan. 1, 1996); U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.) [hereinafter PROACTIVE DISCLOSURES]. Indexes of such decisions must also be made electronically available. This can be achieved by providing a link to each decision on an agency's website. *Id.* at 22.
[38] Herz, *supra* note 16, at 586.
[39] 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).
[40] *See* PROACTIVE DISCLOSURES, *supra* note 37, at 16 (Final opinions and orders, and the other materials required to be disclosed under FOIA's affirmative disclosure provisions, "that have no precedential value and do not constitute the working law of the agency are not required to be made available under [that provision] of [FOIA]."); *see also Sears, Roebuck*, 421 U.S. at 153-54 (1975) (Section 552(a)(2) "represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'") (citing H. REP. 1497, 89th Cong. 2d sess. (May 9, 1966), at 7); Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 679 (D.C. Cir. 2016) (holding that complaint resolution decisions about individual immigration judges are not subject to FOIA's affirmative disclosure requirement because the decisions "set no precedent, have no binding force on the agency in later decisions, and indeed have no effect on anyone except the individual immigration judge who is the subject of the particular complaint."); Skelton v. U.S. Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982) (Section 552(a)(2) "was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'") (quoting H. REP. 1497, 89th Cong. 2d sess. (May 9, 1966), at 8); Tereshchuk v.

Whether a decision is precedential is ultimately up to the agency; only decisions that an agency considers binding or that it preserves for research and general reference are generally considered as such.[41] FOIA, therefore, requires the disclosure of only a narrow subset of materials.

Acknowledging FOIA's limited scope, on his first full day in office in 2009, former President Obama urged agencies to develop disclosure practices that expand on the statute's basic requirements. In a memorandum to agency heads (FOIA Memorandum), President Obama expressed his desire that the disclosure law "be administered with a clear presumption: In the face of doubt, openness prevails."[42] While the FOIA Memorandum largely concerned agency policies with respect to FOIA document requests, President Obama underscored that "the presumption of disclosure also means that agencies should take affirmative steps to make information public" and "use modern technology to inform citizens about what is known and done by their Government."[43]

With the passage of the recently enacted FOIA Improvement Act of 2016,[44] Congress integrated President Obama's disclosure policy into the text of FOIA. Specifically, the new Act modified FOIA's affirmative disclosure provision. Whereas before the provision's opening language required that final opinions and orders be "ma[de] available for public inspection and copying," pursuant to the 2016 Act agencies must now make such materials available "for public inspection in an electronic format."[45] The Act imposes the same "electronic format" requirement on the public indexes agencies must maintain.[46] This new language appears to indicate that final opinions and orders issued *before* November 1, 1996, are required to be disclosed online.

Reprinted below is the current text of FOIA's affirmative disclosure provision as concerns the dissemination of adjudicatory decisions (5 U.S.C. § 552(a)(2)(A)). The 2016 Act additions are represented in italics.

Bureau of Prisons, 67 F.Supp. 3d 441, 456 (D. D.C. 2014) ("In determining whether Section 552(a)(2) applies, this Circuit . . . . looks to whether the records at issue have 'precedential significance.' Records that have no precedential value and do not constitute working law of the agency are not required to be made available under this part of [FOIA].") (internal citations omitted). *But see* Nat'l Prison Project of ACLU Found., Inc. v. Sigler, 390 F.Supp. 789, 793 (D.D.C. 1975) (holding that the disclosure provision is not limited to precedential orders); U.S. GEN. ACCT. OFF., FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS 27 (1986) (opining that § 552(a)(2)(A) mandates the disclosure of all final opinions, not simply those of precedential value).

[41] Margaret Gilhooley, *The Availability of Decisions and Precedents in Agency Adjudications: The Impact of the Freedom of Information Act Publication Requirements*, 3 ADMIN. L. J. 53, 62 nn.53-54, 83 (1989) (citing Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), *and* Tax Analysists v. IRS, 362 F. Supp. 1298, 1306 (D.D.C. 1973)). In Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 54 Fed. Reg. 53,495 (Dec. 29, 1989), the Administrative Conference recommended that agencies index all final decisions, or at least "significant" decisions that, for example, tackle emerging trends or develop policy in unsettled areas of the law.

[42] Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 26, 2009).

[43] *Id.*; *see also* Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879 (Oct. 8, 2009) (providing guidance on President Obama's FOIA policy). As of the time of this writing, President Trump has not announced his Administration's FOIA policy.

[44] Pub. L. No. 114-185, 130 Stat. 538 (2016).

[45] *Id.* § 2(1)(A)(i), 130 Stat. at 538.

[46] *Id.* § 2(1)(A)(iii), 130 Stat. at 538.

> **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**
>
> (a) Each agency shall make available to the public information as follows:
> . . . .
>
> (2) Each agency, in accordance with published rules, shall make available *for public inspection in an electronic format*—
>
> > (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . . .
>
> * * * For [final opinions and orders] created on or after November 1, 1996, . . . each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means . . . . Each agency shall also maintain and make available *for public inspection in an electronic format* current indexes providing identifying information for the public as to any [final opinion or order] . . . issued . . . after July 4, 1967 . . . . A final order [or] opinion . . . may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> > (i) it has been indexed and either made available or published as provided by this paragraph; or
> >
> > (ii) the party has actual and timely notice of the terms thereof.[47]

In requiring that agencies electronically disclose precedential opinions and orders, FOIA is the only statute that specifically mandates the dissemination of adjudicatory materials on agency websites. Other directives, however, arguably memorialize a policy in favor of the broader disclosure of adjudication materials.

2. Federal Records Act

The 2016 FOIA Improvement Act also amended the FRA. The FRA requires that agencies create and maintain efficient records management programs.[48] The 2016 Act modified the FRA by adding a requirement that such 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.[49]

The extent to which this requirement will affect an increase in the adjudication materials agencies disclose online is an open question. Records chosen for electronic disclosure must not only be "of general interest or use to the public," but also "appropriate" for disclosure. While

[47] 5 U.S.C. § 552(a)(2)(A); FOIA Improvement Act of 2016, Pub. L. No. 114-185, §§ 2(1)(A)(i), (ii), 130 Stat. at 538.
[48] 44 U.S.C. §§ 3101, 3102.
[49] *Id.* § 3102(2).

adjudication materials, especially decisions, likely meet this test, the amount of discretion the new provision leaves agencies suggests that any effect on disclosure practices will be minimal.[50]

3. Paperwork Reduction Act

The PRA does not mandate the electronic disclosure of adjudicatory materials, but it does represent an attempt by Congress to promote greater electronic availability of important government records. In an effort to "ensure that the public has timely and equitable access to [agencies'] public information," the statute directs agencies to "disseminat[e] public information in an efficient, effective, and economical manner,"[51] which, nowadays, means online disclosure.[52] While it may seem at first blush that the PRA mandates the electronic disclosure of nearly all administrative adjudication materials (beyond simply the "final opinions . . . [and] orders" mandated by FOIA), such a broad interpretation is foreclosed by the term "public information" as used in the statute. The PRA defines "public information" as "any information . . . that an agency discloses, disseminates, or makes available to the public."[53] Thus, the PRA's electronic dissemination requirement only applies to materials an agency already discloses.[54] If an agency does not disclose materials in excess of FOIA's requirements, it is not obligated to do so electronically by the PRA.

In 1985, OMB issued Circular A-130 pursuant, in part, to its authority under the PRA.[55] The circular, most recently updated in July 2016, contains a series of federal information management directives for agencies. With respect to access to federal materials, Circular A-130 requires that agencies "provide information to the public consistent with their missions and subject to Federal law and policy" by, in relevant part:

> Publishing 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.[56]

"Public information," however, is defined by the circular precisely as it is defined by the PRA. Therefore, OMB Circular A-130 does not actually obligate agencies to publish adjudicatory materials online. But, along with the PRA, it does represent implicit government approval of the electronic dissemination of a whole host of administrative adjudication materials beyond the final opinions and orders authorized by FOIA.

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[50] *See* Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 493 (2015) (discussing the same provision from the Senate bill, FOIA Improvement Act of 2015, S. 337, 114th Cong., § 4 (2015)).
[51] 44 U.S.C. § 3506(d)(1)(C).
[52] Herz, *supra* note 16, at 592.
[53] 44 U.S.C. § 3502(12).
[54] Herz, *supra* note 16, at 592.
[55] OMB circulars provide instruction and important information for federal agencies. *See Circulars*, OFFICE OF MGMT. & BUDGET (last visited Nov. 8, 2016), https://www.whitehouse.gov/omb/circulars_default.
[56] OMB Circular A-130, § 5.e.2.a. It also imparts on agencies the responsibility of "[c]onsidering the impact of providing agency information and services over the Internet for individuals who do not own computers or lack Internet access . . . ." *Id.* § 5.e.2.f.

4. E-Government Act of 2002

The E-Government Act of 2002 contains two provisions relevant to the electronic dissemination of adjudication materials. The first, section 206, provides:

> To the extent practicable as determined by the agency in consultation with the Director [of OMB], each agency . . . shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.[57]

While section 206 may at first appear to require electronic disclosure of adjudication decisions (and other (a)(2) materials), as Michael Herz has noted, the provision actually suffers from several deficiencies that ultimately render it an empty directive.[58] As a preliminary matter, the provision is the product of poor drafting.[59] Section 206 obligates agencies to disseminate online materials that "paragraphs (1) and (2) of [5 U.S.C. §] 552(a)" require to be published in the *Federal Register*. But § 552(a)(2) does not mandate publication in the *Federal Register*. While subparagraph (1) contains such a requirement for certain materials (e.g., rules and significant guidance documents),[60] subparagraph (2) only mandates that final opinions, orders, and the other materials falling under its ambit be made "available for public inspection" in electronic reading rooms.[61] Therefore, Congress's intent is not entirely clear from the face of the statute.

But even if Congress intended for section 206 to apply to the disclosure of § 552(a)(2) materials, the section does not in fact obligate agencies to do anything.[62] First, if it does apply, it is redundant with FOIA.[63] Second, section 206 only directs agencies to disclose (a)(2) material online "[t]o the extent practicable as determined by the agency." Therefore, the decision to disclose adjudicatory materials under the section, in the event it provides as such, is wholly within the discretion of the agency.[64] Lastly, it is not readily apparent that adjudicatory decisions constitute "information about the agency."

Section 207 of the E-Government Act also appears, upon an initial reading, to impose an obligation on agencies to disclose adjudicatory materials online. That section requires that agency websites provide links to, among other materials, "information made available to the public under subsections (a)(1) and (b) of section 552 of title 5, United States Code (commonly referred to as the 'Freedom of Information Act')."[65] This provision as well, however, contains a drafting error

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[57] 44 U.S.C. § 3501 (note).
[58] *See* Herz, *supra* note 16, at 594-95.
[59] *See* Michael B. Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENVTL. L. J. 18, 45 (2003).
[60] 5 U.S.C. § 552(a)(1).
[61] Gerrard & Herz, *supra* note 59, at 46.
[62] *See id.*
[63] Herz, *supra* note 16, at 595. Although, "publicly accessible Federal Government website" is more explicit than "electronic means."
[64] *Id.* at 594.
[65] 44 U.S.C. § 3501 (note).

that muddles its meaning.[66] Section 552(b) does not "m[ake] information available"; in fact, it actually lists the nine exemptions to FOIA's disclosure requirements that authorize agencies to make records—including (a)(2) materials—*un*available.[67] But, even assuming Congress intended that section 207 should apply to (a)(2) materials instead of subparagraph (b), such a requirement is, as with section 206, redundant with FOIA.[68]

5. Open Government Memorandum

On the same day he signed the FOIA Memorandum, President Obama also issued the Transparency and Open Government Memorandum.[69] In that memorandum, President Obama expressed his administration's commitment "to creating an unprecedented level of openness in Government" and directed agencies to "harness new technologies to put information about their operations and decisions online and readily available to the public."[70] In response, OMB issued the Open Government Directive.[71] The Directive instructed agencies to take specific steps to implement President Obama's open government policy. Each agency was told—"[t]o the extent practicable"— to "proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA."[72]

The memorandum does not impose any legally enforceable obligation on agencies and is, in fact, written in such an open-ended manner that it is unclear what precisely agencies are expected to do to comply with its exhortations. The Trump Administration has not yet announced its policy on transparency and open government.

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The laws and policies discussed above represent attempts by the government to increase public transparency through promotion of the online disclosure of important government materials. President Obama's FOIA and open government policies, the FRA, PRA, and OMB Circular A-130 potentially encourage agencies to disclose non-precedential orders, briefs, motions, complaints, and other adjudication materials online along with FOIA's precedential decisions. All indicate a desire on the part of the elected branches of government to increase access to important information and promote greater transparency and accountability.

II. SURVEY

Although there is no system akin to *Regulations.gov* or PACER for administrative adjudication, as Part I explained, agencies are nonetheless encouraged and, indeed, in the case of FOIA, specifically required to disclose certain adjudicatory materials online. To the extent agencies comply with FOIA and the other laws and policies discussed above, they do so by

[66] Gerrard & Herz, *supra* note 59, at 48.
[67] *See* 5 U.S.C. § 552(b)(1)–(9); Gerrard & Herz, *supra* note 59, at 48.
[68] Herz, *supra* note 16, at 595.
[69] Transparency and Open Government Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,685 (Jan. 26, 2009).
[70] *Id.*
[71] Office of Mgmt. & Budget, Exec. Office of the President, M-10-16, Open Government Directive (Dec. 8, 2009).
[72] *Id.* at 2. The Directive also called for the creation of "an Open Government Webpage . . . to serve as the gateway for agency activities related to the Open Government Directive."

disclosing adjudication materials on their individual websites. Therefore, in order to evaluate agencies' compliance with baseline legal requirements and form a clearer picture of agencies' disclosure practices, I conducted a survey of 24 agency websites and assessed whether each one maintained accessible, comprehensive collections of adjudication materials.

The websites of the following agencies were surveyed:

- Board of Veterans Appeals, Department of Veterans Affairs (BVA)
- Civilian Board of Contract Appeals, General Services Administration (CBCA)
- Commodity Futures Trading Commission (CFTC)
- Consumer Financial Protection Bureau (CFPB)
- Consumer Product Safety Commission (CPSC)
- Copyright Royalty Board, Library of Congress (CRB)
- Department of Housing & Urban Development (HUD)
- Department of Labor (DOL)
- Environmental Protection Agency (EPA)
- Equal Employment Opportunity Commission (EEOC)
- Federal Communications Commission (FCC)
- Federal Energy Regulatory Commission (FERC)
- Federal Maritime Commission (FMC)
- Federal Mine Safety & Health Review Commission (FMSHRC)
- Federal Trade Commission (FTC)
- National Appeals Division, Department of Agriculture (NAD)
- National Labor Relations Board (NLRB)
- Occupational Safety & Health Review Commission (OSHRC)
- Office of Medicare Hearings & Appeals, Department of Health & Human Services (OMHA)
- Pension Benefit Guaranty Corporation (PBGC)
- Postal Regulatory Commission (PRC)
- Securities & Exchange Commission (SEC)
- Social Security Administration (SSA)

- United States Postal Service (USPS)

The agencies were selected for a number of reasons. All engage in some form of adjudication. Large as well as small agencies were included in the survey in order to determine whether more personnel and resources translated to more comprehensive adjudication dockets. For similar reasons, the survey included both agencies that engage solely or primarily in adjudication to make law and policy (e.g., NLRB), as well as those that, in addition to adjudication, engage in extensive amounts of rulemaking (e.g., EPA). I wanted to survey a handful of departments (HUD and DOL), based on the belief that some individuals may venture to the main website of a department instead of a specific agency within that particular department in search of adjudication materials, as well as certain components of departments (BVA and OMHA) that engage in high levels of adjudication. Lastly, I desired to include a variety of institutional "types" within the study. I therefore selected websites maintained by executive departments and agencies,[73] independent regulatory agencies,[74] government corporations,[75] independent administrations,[76] and even one legislative agency.[77]

Six researchers aided me in the study. All six, consisting of two research fellows, two law clerks, and two interns, were either recent law school graduates or current law students. Each researcher surveyed several websites and answered a series of identical research questions aimed at eliciting the navigability and comprehensiveness of the websites examined.[78] To help focus their surveys, the researchers were instructed to use the *Federal Administrative Adjudication* public database as a reference. The database, a joint project of the Administrative Conference and Stanford Law School, charts the span of federal administrative adjudication[79] by, among other things, cataloging the various matters handled by adjudicative bodies in both APA and non-APA adjudications.[80]

The research questions were divided into two general parts. Part I asked each researcher to assess the general navigability of the websites—that is, how easy or difficult it is for a user to navigate to, and thus access, adjudication materials. Subpart A asked whether each website contained a search engine and a site map or index on its homepage.[81] These two features were selected due to their potential usefulness in directing users to adjudication materials. In Subpart

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[73] BVA, HUD, DOL, FERC, NAD, and OMHA.
[74] CFTC, CFPB, CPSC, EEOC, FCC, FMC, FMSHRC, FTC, NLRB, OSHRC, and PRC.
[75] PBGC and USPS.
[76] EPA, CBCA, SEC, and SSA.
[77] CRB.
[78] A copy of the research questions can be found in the appendix. It should be noted that, as mentioned in footnotes 81 and 83, *infra*, not all of the tools and materials asked about were ultimately considered in the final analysis. The framework of the questions was inspired by that developed by Stuart Shapiro and Cary Coglianese in their 2007 study, First Generation E-Rulemaking: An Assessment of Regulatory Agency Websites (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-15, 2007), *available at* http://papers.ssrn.com/abstract=980247.
[79] The database, however, does not contain information about military adjudication.
[80] *Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited March 3, 2017), http://acus.law.stanford.edu/
[81] Subpart A also asked whether each website contained foreign language options, disability friendly features, and a "help" function or "Frequently Asked Questions" page or pages. Data relating to the presence or absence of these functions were ultimately not assessed.

B, the researchers were tasked with examining the adjudication sections specific to each website. Questions included how to navigate to a website's adjudication section from the homepage, as well as how to search for materials within adjudication sections.[82]

Part II of the research questions focused on the online disclosure practices of the survey agencies. Researchers examined whether each website contained accessible links to orders and opinions and supporting adjudicatory materials and, if so, examples of the various types of such documents disclosed.[83] For purposes of this study, an order or opinion is any decision that was reached by one or more federal officials presiding over an oral or written hearing.[84] While this definition excludes documents embraced by the APA's more expansive definition of "order,"[85] it includes not only FOIA's "precedential" decisions, but also non-precedential and procedural orders. Specifically, I sought to determine whether each agency included not only orders issued by its first line adjudicators (e.g., ALJs, AJs), but also the orders and opinions issued by agency appellate bodies (including the agency head or heads). From the answers to these questions, I sought to gauge the level of comprehensiveness of the agencies' online adjudication dockets.[86]

After reviewing the individual surveys, I ultimately determined to chart whether each surveyed website contained any of the following six types of resources and records: (1) a search engine located on the homepage; (2) a site map or index accessible from the homepage; (3) an adjudication section or sections; (4) first line adjudicators' orders; (5) appellate orders and opinions; and (6) supporting adjudicatory materials. These terms are defined for purposes of this report as follows.

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[82] Researchers were also asked how documents were organized, what formats the documents were in (e.g., PDF, TXT, DOC), whether any documents listed were inaccessible, and whether there was a specific "FOIA," "open government," or related section that disclosed adjudicatory materials (and whether it was the same as an identified adjudication section).

[83] Questions also directed researchers to identify the types of "other" materials (e.g., press releases, case summaries) and materials associated with appeals of agency action in federal court (including opinions) disseminated on each website. While useful, these types of materials were ultimately not assessed as part of the study.

[84] *See FAQ*, *Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Nov. 21, 2016), http://acus.law.stanford.edu/content/user-guide (defining "adjudication" for the purposes of the *Federal Administrative Adjudication* public database as "[1] a decision by one or more federal officials made through an administrative process [2] to resolve a claim or dispute arising out of a federal program [3] between a private party and the government or two or more private parties [4] based on a hearing—either oral or written—in which one or more parties have an opportunity to introduce evidence or make arguments.").

[85] The APA defines an "order" as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). This definition includes everything from judicial-like orders and opinions issued in formal and semi-formal proceedings to agency advisory letters and policy manuals. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 114-17 (1998) (discussing informal adjudicatory orders). Because the definition adopted for this study embraces only decisions issued in formal and semiformal adjudications, documents such as SSA acquiescence rulings, CFPB warning letters, and PBGC opinion letters are not considered "orders" or "opinions" for the purposes of this study.

[86] It is an inherent limitation of this study that there is no manageable way to determine the exact number of decisions and supporting materials issued by each agency and, therefore, to gauge with more accuracy their compliance with FOIA.

- A "search engine," unless otherwise specified, is a search engine an agency maintains on its website's homepage that allows users to generate results from the entire website, not one that is specific to a particular section of the website.
- A "site map" is a detailed table of contents of a website, with each "chapter" or "subchapter" containing links to the respective sections of the website.
- An "index" offers links to sections of a website organized alphabetically or topically.
- An "adjudication section" (or "adjudicatory section") is the section of a website containing information relevant to an agency's adjudication functions.
- "First line adjudicators' orders" are orders issued by ALJs, AJs, or other hearing-level adjudication officers following an evidentiary hearing. Note that this definition does not apply to "front-line" decisions by agency staff that constitute an initial agency decision to, for example, impose a sanction or deny benefits where the adverse party is able to appeal that decision and participate in a subsequent evidentiary hearing.[87]
- "Appellate orders and opinions" are decisions issued by an appellate body within an agency, or the agency head or heads, on appeals from the determinations of first line adjudicators.[88]
- Lastly, "supporting adjudication materials" (or "supporting adjudicatory materials") are any pleadings, briefs, motions, and other documents filed by the parties in a proceeding.

Table 1 displays the results of the survey. Whether a resource or type of record was identified as present on an agency's website is represented in Table 1 with either a Y (yes it was so identified) or N (no it was not so identified). An asterisk (*) next to an agency's initials indicates that the agency is a component of a larger agency (e.g., BVA is a component of the Department of Veterans Affairs). An asterisk next to a Y in the "Search Engine" column indicates that, although there was a search engine located on a component agency's section of a website, the search engine was not specific to the component section but, rather, generated results from the entire website. Site maps and indexes were only indicated as present on a component agency's section of a website

[87] *See* Asimow, Evidentiary Proceedings, *supra* note 11, at 10.

[88] Whether decisions were classified as first line orders or appellate orders or opinions for purposes of this report was based on the classification of the adjudicatory hearing from which a decision was issued, as defined by the ACUS-Stanford database. *See Types of Hearings and Appeals, Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Dec. 27, 2016), http://acus.law.stanford.edu/reports/types-of-hearings?type_1=hearing_level_procedures&&items_per_page=100&page=1. Therefore, for example, because CBCA proceedings are classified as "hearing level proceedings" by the database, decisions issued by CBCA are considered first line adjudicators' orders for the purposes of this report. *See GSAONPRC0002 – Hearing Level – Procedures, Federal Administrative Adjudication*, ADMIN. CONF. U.S. (last visited Dec. 27, 2016), http://acus.law.stanford.edu/hearing-level/gsaonprc0002-hearing-level-procedures.

if the site map or index was particular to that section of the website and not, as was typical, to the larger website more generally.

Table 1. Resources and Adjudication Materials on Select Agency Websites

Agencies & Web Addresses	Search Engine	Site Map or Index	Adjudication Section(s)	First Line Adjudicators' Orders	Appellate Orders and Opinions	Supporting Adjudicatory Materials
BVA* *www.bva.va.gov*	Y	N	Y	Y	N/A	N
CBCA* *www.cbca.gsa.gov*	Y	N	Y	Y	N/A	N
CFPB *www.consumerfinance.gov*	Y	N	Y	Y	Y	Y
CFTC *www.cftc.gov*	Y	Y	Y	Y	Y	N
CPSC *www.cpsc.gov*	Y	Y	Y	Y	Y	Y
CRB* *www.loc.gov/crb*	Y	N	Y	Y	N/A	Y
DOL *www.dol.gov*	Y	Y	Y	Y	Y	Y
EEOC *www.eeoc.gov*	Y	Y	Y	N	Y	N[89]
EPA *www.epa.gov*	Y	Y	Y	Y	Y	Y
FCC *www.fcc.gov*	Y	Y	Y	Y	Y	N
FERC *www.ferc.gov*	Y	Y	Y	Y	Y	Y
FMC *www.fmc.gov*	Y	Y	Y	Y	Y	Y
FMSHRC *www.fmshrc.gov*	Y	N	Y	Y	Y	N[90]
FTC *www.ftc.gov*	Y	Y	Y	Y	Y	Y
HUD *www.hud.gov*	Y	Y	Y	Y	N	N
NAD* *www.nad.usda.gov*	Y	Y	Y	Y	Y	N
NLRB *www.nlrb.gov*	Y	Y	Y	Y	Y	Y
OSHRC *www.oshrc.gov*	Y	N	Y	Y	Y	Y
OMHA* *www.hhs.gov/about/agencies/omha*	Y*	N	Y	N	N/A	N
PBGC *www.pbgc.gov*	Y	Y	Y	Y	N/A	N
PRC *www.prc.gov*	Y	Y	Y	Y	Y	Y
SEC *www.sec.gov*	Y	Y	Y	Y	Y	Y
SSA *www.ssa.gov*	Y	Y	Y	Y	Y	N
USPS *www.usps.com*	Y	Y	Y	Y	Y	N

[89] There are some amicus briefs filed by EEOC in non-EEOC administrative proceedings accessible from the EEOC website. *Commission Appellate and Amicus Briefs*, U.S. EQUAL EMPLOY. OPP. COMM'N (last visited Dec. 29, 2016), https://www1.eeoc.gov/eeoc/litigation/briefs.cfm?redirected=1.

[90] FMSHRC's website does contain audio files of oral arguments. *Oral Arguments*, FED. MINE SAFE. & HEALTH REV. COMM'N (last visited Dec. 20, 2016), https://www.fmshrc.gov/meetings-arguments/arguments. Oral argument recordings, however, do not constitute supporting adjudicatory materials as defined by this report.

III. ANALYSIS

The table reveals a high degree of uniformity among the surveyed websites, particularly regarding the presence of navigation functions. The data demonstrate that all of the agencies surveyed maintained relatively "navigable" websites. All 24 contained a search engine on their homepage (or the component agency's subpage). Seventeen websites contained a site map and/or an index accessible from the homepage. In addition, all 24 websites surveyed maintained one or more adjudication sections. This breakdown is represented in Table 2.

Table 2. Number of Agency Websites with a Search Engine on its Homepage, a Sitemap and/or an Index Accessible from its Homepage, and an Adjudication Section or Sections

Search Engine	Sitemap or Index	Adjudication Section(s)
24/24	17/24	24/24

Table 1 suggests a similar degree of uniformity regarding the dissemination of adjudicative decisions. Twenty-two of the 24 websites surveyed maintained copies of orders of the agencies' first line adjudicators. Eighteen of the 19 websites maintained by agencies with appellate systems disclosed appellate orders and opinions. Records were available in PDF, TXT, DOC, HTML, and other formats (but generally PDF). The research undergirding these findings suggests that agencies are generally in compliance with 5 U.S.C. § 552(a)(2)(A). Of course, as discussed above, because the "final opinions . . . [and] orders" of that provision have generally been interpreted to mean only decisions agencies deem binding or which they preserve for research and general reference, whether an agency is truly in compliance with FOIA is ultimately only known to the agency.[91] That said, the individual surveys revealed that most of the agencies that offered links to copies of decisions maintained extensive decisional libraries that at least appeared FOIA-compliant.

Half of the agencies (12/24) provided access to supporting adjudication materials on their websites. Whether an agency disclosed supporting adjudication materials was not dictated by such obvious factors as its size and, presumably therefore, the amount of resources available to it. Neither the largest nor the smallest agencies, in terms of number of personnel, whose websites were surveyed (SSA and FMSHRC, respectively) disclosed such materials. And while, for example, CFPB, EPA, FTC, NLRB, and SEC—all agencies employing 1,000 or more employees each—did post links to certain supporting adjudicatory materials on their websites, so too did CPSC (~536 employees), FMC (~122), and OSHRC (~52).[92]

[91] *See supra* Part I.B.1.

[92] For these figures, see *March 2016, Employment Cubes, FedScope*, U.S. OFF. PERS. MGMT. (last visited Dec. 21, 2016), https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll.

Table 3. Number of Agency Websites that Maintained Copies of First Line Adjudicators' Orders, Appellate Decisions, and Supporting Adjudication Materials

First Line Adjudicators' Orders	Appellate Decisions	Supporting Adjudication Materials
22/24	18/19	12/24

Table 1, however, only goes so far in shedding light on the disclosure practices of the surveyed agencies. A scan of the table may understandably lead a reader to believe that agency websites occupying rows filled with Ys or mostly Ys are the most robust of the surveyed websites. The table, however, is misleading in this regard. Table 1 only indicates whether a website disclosed at least one first line adjudicator's order, appellate order or opinion, and supporting adjudication record, respectively. Thus, for instance, while the table displays Ys in every row corresponding with OSHRC save for whether the agency maintains a site map or index on its homepage, OSHRC's adjudication section was less comprehensive than that of, for example, EPA and FTC's websites. This is because the only supporting adjudicatory materials disclosed on OSHRC's website were those associated with seven cases listed on the agency's "e-Reading Room" page.[93] OSHRC's main adjudication section did not disclose supporting adjudication materials.[94]

The table, therefore, may overstate the comprehensiveness of some websites' adjudication sections. This also applies to the diversity of materials agencies disclosed. While an exhaustive examination of every type of order, opinion, and supporting adjudication record was beyond the scope of this study, it was impossible to ignore the fact that a Y in a column for Agency A did not necessarily mean the same thing as a Y in the same column for Agency B. For instance, Table 1 accurately indicates that FMC and PBGC both posted first line adjudicators' orders on their websites; however, whereas FMC posted seemingly all ALJ decisions, PBGC's website only disclosed decisions of its Appeals Board considered "significant or relevant to a large number of participants."[95]

This Part examines the survey's findings. Section A discusses the search engines and site maps and indexes located on agency websites' homepages, as well as the websites' adjudication sections. Section B discusses the general practices observed with respect to the online disclosure of adjudicatory decisions and supporting adjudicatory materials by the surveyed agencies. Both sections discuss agency disclosure practices in some detail and may appear very abstract unless the reader is navigating the websites under discussion at the same time she is reading. In an attempt to illuminate the discussion and ease readers' potential frustrations, I have included explanatory

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[93] *OSHRC e-Reading Room*, OCCUP. SAFETY & HEALTH REV. COMM'N (last updated Sept. 28, 2011), http://www.oshrc.gov/foia/foia_reading_room.html.

[94] *Decisions*, OCCUP. SAFETY & HEALTH REV. COMM'N (last visited Jan. 9, 2017), http://www.oshrc.gov/decisions/index.html.

[95] *Appeals Board Decisions*, PENS. BEN. GUAR. FUND (last visited Jan. 6, 2017), http://www.pbgc.gov/prac/appeals-board/appeals-decisions.html.

screenshots from agency websites in places where I do not think doing so will cause needless distraction.

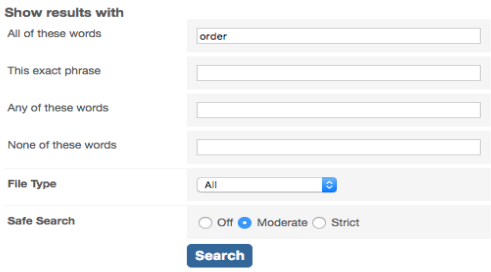
A. Navigability

1. Search Engine

While each website surveyed maintained a search engine on its homepage, not all search engines were equally effective in locating adjudicatory materials. As a general matter, entering common search terms into a website's search engine, such as "adjudication," "decision," "opinion," or "order" led to a page containing an overwhelmingly long laundry list of results. Results generally included adjudicatory materials (usually orders), but one had to use precise search terms, such as the title or docket number of a case, to locate a particular record or docket.

Most of the websites' search engines allowed users to filter results by date or category. Some filters bore no relevance to adjudicatory materials and were therefore not helpful in uncovering adjudication records. Others allowed users to narrow their searches to specific types of adjudicatory materials and therefore made the search results more manageable to sift through. NLRB's search engine, for example, enabled users to filter results initially by either "Case Documents" or "Cases." Depending on the filter selected, one could further narrow one's search by document type (e.g., "Board Decisions," "Administrative Law Judges Decisions") or date.[96] Some other websites contained equally effective filtering options.[97]

Figure 1. Example of Advanced Search Options on FMSHRC's Website[98]



Search engines are therefore useful for finding adjudicatory materials generally, as well as for locating specific materials provided a user enters search terms particular to an identifiable record. If a website has an advanced search engine, the odds of finding a particular record or type of record are generally greater.

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[96] *Search*, NAT'L LAB. REL. BD. (last visited Dec. 12, 2016), https://www.nlrb.gov/search/all/decision. Users may filter by document type *and* date if searching under "All." *Id.* The descriptions of the websites discussed are consistent with their statuses as of January 2017.

[97] *See, e.g.*, *Search Results*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited December 12, 2016) https://search.usa.gov/search?query=decisions&submit.x=0&submit.y=0&submit=Send&affiliate=fmshrc (filters available include "Commission Decisions" and "ALJ Decisions").

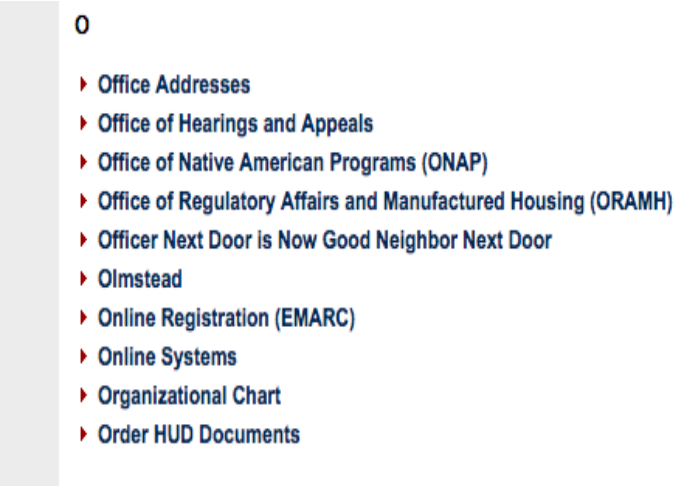
[98] *Advanced Search*, FED. MINE SAFETY & HEALTH REV. COMM'N (Jan. 3, 2017), https://search.usa.gov/search/advanced?affiliate=fmshrc&enable_highlighting=true&per_page=20&query=order.

2. Site Map or Index

Seventeen out of 24 websites contained a site map or an index (or both) either locatable from the homepage or displayed at the bottom of the homepage (in the case of site maps only).[99] Fourteen websites had a site map,[100] five had an index,[101] and two had both.[102] The site maps and indexes examined displayed links to the adjudication sections of agency websites in easily searchable and logically organized formats. Websites that contained at least one of these tools enhanced the ease of navigating to an agency's adjudication section or sections.

Figure 2. Portion of Sitemap from NLRB's Website[103]

Figure 3. Portion of "A-Z Index" from HUD's Website[104]



[99] *See* FED. TRADE COMM'N (last visited Dec. 17, 2016), https://www.ftc.gov/ (site map located at the bottom of the homepage).
[100] CFTC, CSPC, EEOC, FCC, FERC, FMC, FTC, HUD, NAD, NLRB, PBGC, PRC, SEC, and SSA.
[101] DOL, EPA, USPS, HUD, and PBGC.
[102] HUD and PBGC.
[103] *Site Map*, NAT'L LABOR RELAT. BD. (last visited Jan. 3, 2017), https://www.nlrb.gov/sitemap.
[104] *HUD's Site Index/Quick Links*, U.S. DEPT. HOUS. & URBAN DEV. (last visited Jan. 3, 2017), https://portal.hud.gov/hudportal/HUD?src=/siteindex/quicklinks.

The utility of a site map or index, however, should not be overstated. Or, rather, it should be understood that the survey did not ultimately reveal that the absence of a site map or index on a website's homepage created a great obstacle to locating adjudication materials. The homepages of BVA, CBCA, CFPB, CRB, FMSHRC, and OSHRC's websites, for example, did not contain site maps or indexes.[105] Those agencies' homepages, however, contained descriptively-titled links to adjudication sections, generally on the banner, that lessened the probability that a user's search for adjudicatory materials would be needlessly impeded.

3. Adjudication Sections

All of the websites (24/24) contained a section or sections dedicated to adjudication. Adjudication sections were generally easy to locate even without resort to a website's site map or index (assuming one or both were present on a website). Most sections were accessible by way of a link on a website's banner entitled "Enforcement," "Documents and Proceedings," "Decisions," or some similar appellation. Some were perhaps less intuitive from the standpoint of a non-lawyer or law-trained individual. PBGC's adjudication section, for example, entitled "Laws & Regulations," was nested under a link on the website's banner called "Practitioners."[106] Even less obvious from any perspective was USPS's adjudication section, which could only be accessed from a link on the footer of the homepage situated beneath the heading "On About.USPS.Com."[107] The locations of those websites' adjudication sections may be appropriate, however, in light of their respective traffic levels and the most likely types of visitors to PBGC's "Law and Regulations" page and USPS's website in general.

The navigation tools offered by the websites' adjudication sections varied, but common themes were revealed during the survey. Many adjudication sections utilized search engines (separate from a website's main search engine) as primary or complementary tools for accessing adjudication records. The only way to locate decisions on BVA's adjudication section, for example, was through a multi-field search engine that allowed users to search for specific words or phrases.[108] BVA, however, was unusual in this regard. Many sites employed a search engine, oftentimes with options for filtering results by, for instance, date or topic, in conjunction with a list of records arranged by date, docket number, name, or some other category.[109] Still others simply listed records by date or category of proceeding without an accompanying search engine.[110]

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[105] This is perhaps most understandable as regards BVA, CBCA, and CRB, as those agencies are components of larger entities.

[106] *Practitioners*, PENS. BEN. GUAR. FUND (last visited Dec. 17, 2016), http://pbgc.gov/prac/.

[107] *About*, U.S. POST. SERV. (last visited Dec. 2016), http://about.usps.com/. The USPS site was the only "dotcom" (as opposed to "dotgov") website surveyed.

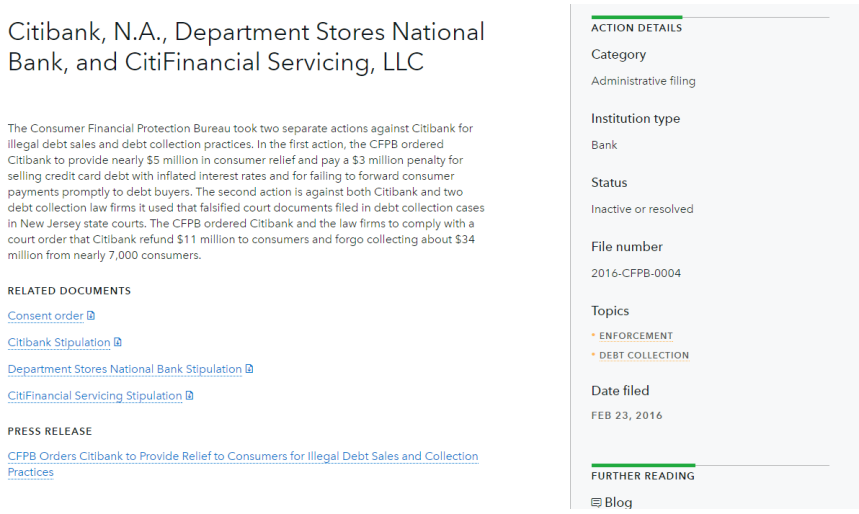
[108] *The Board of Veterans' Appeals Decision Search Results*, U.S. DEP'T VET. AFFAIRS (last updated April 27, 2016), http://www.index.va.gov/search/va/bva.jsp.

[109] *See Enforcement Actions*, CONSUM. FINANC. PROT. BUREAU (last visited Dec. 15, 2016), http://www.consumerfinance.gov/policy-compliance/enforcement/actions/; *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 15, 2016), https://www.ftc.gov/enforcement/cases-proceedings; *Active Cases*, POST. REG. COMM'N (last visited Dec. 17, 2016), http://www.prc.gov/dockets/active.

[110] *See Dispositions*, U.S. COMM. FUT. TRAD. COMM'N (last visited Dec. 15, 2016), http://www.cftc.gov/LawRegulation/Dispositions/index.htm; *Administrative Sanction Decisions*, U.S. DEPT. HOUS. & URBAN DEVELOP. (last visited Dec. 15, 2016), https://portal.hud.gov/hudportal/HUD?src=/program_offices/hearings

Some adjudication sections grouped records by docket. For instance, clicking on the name of a case listed on CFPB's "Enforcement Actions" page led the user to a page containing adjudicatory materials filed in that particular case, as well as helpful identifying information such as the status (e.g., inactive or resolved) and category (i.e., administrative filing or federal district court case) of the proceeding.[111] This type of organizational structure is useful when navigating an adjudication section of a website maintained by an agency with a large adjudicatory footprint, such as NLRB. Hovering over the "Cases and Decisions" banner link on that agency's website displayed an array of available options for viewing or filing records, including links to Board and ALJ decisions that, by clicking on a hyperlinked case number, enabled one to view most if not all of the records filed and issued in that particular case.[112]

Figure 4. Example of Docket from CFPB's Website[113]



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The websites surveyed were, therefore, generally highly navigable, with all or most maintaining a search engine and a sitemap and/or index on their homepage. In addition, all of the websites maintained one or more adjudication section, all of which offered a variety of organizational and navigational features.

_appeals/bca/decisions/das/bcasanct; *Decisions*, OCCUP. SAFETY & HEALTH REV. COMM'N (last visited Jan. 7, 2017), http://oshrc.gov/decisions/index.html.

[111] *See, e.g.*, *American Advisors Group*, *Enforcement Actions*, *Enforcement*, CONSUM. FINANC. PROT. BUREAU (last visited Dec. 15, 2016), http://www.consumerfinance.gov/policy-compliance/enforcement/actions/american-advisors-group/.

[112] *See, e.g.*, *Equinox Holdings, Inc.*, *Case Search*, *Cases & Decisions*, NAT'L LAB. RELAT. BD. (last visited Dec. 17, 2016), https://www.nlrb.gov/case/20-CA-167342. It also contains a list of participants and summary of the allegation. *See id.*

[113] *Citibank, N.A., Department Stores National Bank, and CitiFinancial Servicing, LLC*, *Enforcement Actions*, *Enforcement*, CONSUM. FINANC. PROT. BUREAU (last visited Jan. 9, 2017), http://www.consumerfinance.gov/policy-compliance/enforcement/actions/citibank-department-stores-national-bank-citifinancial-servicing/.

B. Disclosure Practices

1. General Disclosure Practices

Agency disclosure practices vary, and the unique organizational features of each website and adjudication section render it difficult to break down agencies' practices into manageable categories. That said, certain practices observed during the survey stood out.

Some websites disclosed all three types of adjudication materials (first line adjudicators' orders, appellate decisions, and supporting adjudicatory materials), grouping the materials together within individual docket pages. EPA and FMC's websites are good examples of a large and medium-sized or small agency (based on number of agency personnel), respectively, that fell within this group. Individual decisions issued by EPA's ALJs and Environmental Appeals Board (EAB) were available from the agency's "Enforcement" page.[114] A wide and diverse array of ALJ and appellate orders and decisions were available among the decisional listings, including various ALJ and EAB procedural orders (e.g., scheduling orders, orders on motions to extend filing deadlines or hearing dates), ALJ initial decisions, and EAB final orders. Decisions were in PDF format.

Two subpages accessible from the "Enforcement" page—the "Administrative Law Judges' E-Docket Database" and the EAB page—enabled users to search adjudicatory materials by docket. Dockets (active and closed) were arranged in reverse chronological order by date of filing.[115] The ALJ database allowed filtering by EPA region, year, and statute.[116] Selecting the hyperlinked-name of a proceeding in either page directed the user to a screen containing an "Index of Filings." Each index contained a list of orders and adjudicatory materials filed in a case, all accessible via hyperlink. For example, the index of filings for a 2015 case entitled *In re Nova Mud, Inc.* contained PDF copies of eight records: the complaint, faxed answer, original answer and copy, letter forwarding the case to the ALJ, letter of invitation to participate in alternative dispute resolution, order of designation, initial prehearing order, and consent agreement and final order.[117]

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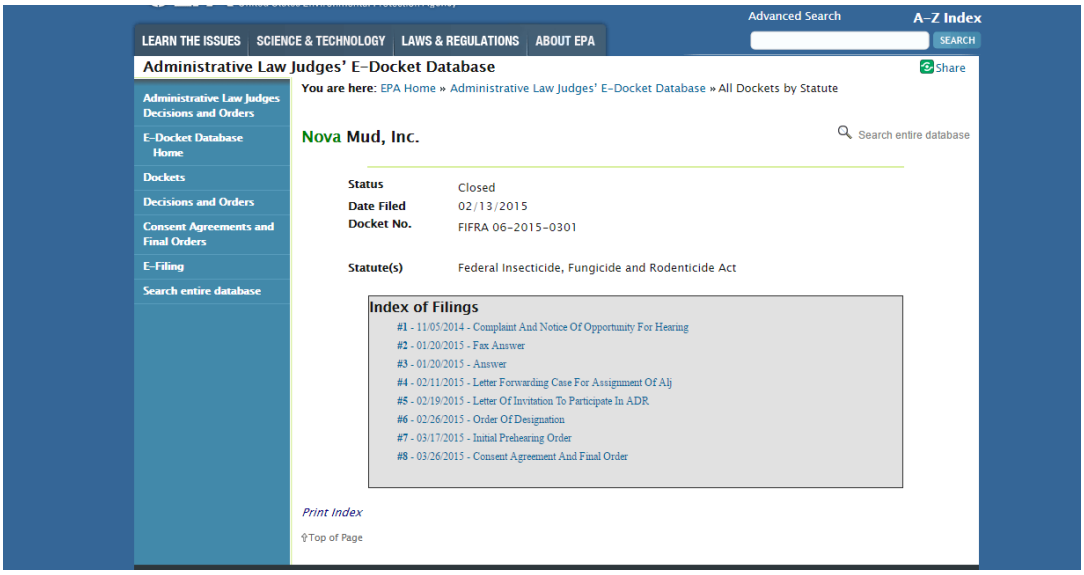
[114] *Cases and Settlements*, U.S. ENVTL. PROT. AGENCY (last visited Dec. 19, 2016), https://www.epa.gov/enforcement/cases-and-settlements.

[115] *Administrative Law Judges' E-Docket Database*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 19, 2016), https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf; *EAB Dockets*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 19, 2016), https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/EAB+Dockets?OpenPage.

[116] *Administrative Law Judges' E-Docket Database*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 19, 2016), https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf.

[117] *Nova Mud, Inc.*, *Administrative Law Judges' E-Docket Database*, U.S. ENVTL. PROT. AGENCY (last visited Jan. 6, 2017), https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/9886a221ad53f23b85257bd30051dc69/901f4a21d72d858c85257df8006e75cf!OpenDocument&Highlight=2,Nova,Mud.

Figure 5. Example of an "Index of Filings" from EPA's Website[118]



While significantly smaller than EPA, FMC maintained an equally comprehensive adjudicatory section on its website.[119] Like EPA's, FMC's website contained a wide array of orders and opinions, including initial and procedural orders and Commission final decisions. Also like EPA's, FMC's website posted a large number of supporting materials, including various types of pleadings and motions. Clicking on the "Documents & Proceedings" link on the homepage's banner led to a page containing links to several adjudicatory sections, including a section entitled "Activity Logs." That section maintained a listing of all documents issued or filed in proceedings before the Commission (dating as far back as the 1980s in a few instances).[120] By navigating to the "Docket Logs" page and clicking on a case name, a user could view the decisions and supporting adjudicatory materials issued or filed in that case.[121] For example, clicking on the case *Global Link Logistics Inc. v. Hapag-Lloyd AG* delivered the user to a page containing a docket list akin, in substance, to the federal court docket sheets available on PACER. Several records, including the complaint, a motion to dismiss and response thereto, the initial decision, a motion to enlarge the time for filing exceptions to the initial decision, and the order approving the settlement agreement and dismissing the proceeding, were all available in PDF format. Additionally, docket

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[118] *Id.*

[119] *Employment Cubes, March 2016, EP-Environmental Protection Agency, FedScope*, U.S. OFF. PERS. MGMT. (last visited Dec. 30, 2016), https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll (indicating that, as of March 2016, EPA employed 15,500 employees); *Employment Cubes, March 2016, MC-Federal Maritime Commission, FedScope*, U.S. OFF. PERS. MGMT. (last visited Dec. 30, 2016), https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll (indicating that, as of March 2016, FMC employed 122 employees) (indicating that, as of March 2016, FMC employed 122 employees).

[120] *See Proceeding or Inquiry Log Search*, FED. MARITIME COMM'N (last visited Dec. 19, 2016), http://www.fmc.gov/electronic_reading_room/proceeding_or_inquiry_log_search.aspx.

[121] *See, e.g.*, *16-17 – Connie Lane Christy and Christy Collection International Inc.* ex rel. *The Annie Grace Foundation for the Children of Bali Indonesia v. Air 7 Seas Transport Logistics Inc.*, FED. MARITIME COMM'N (last visited Dec. 19, 2016), http://www.fmc.gov/16-17/.

notations indicating, for instance, that the initial order had been served on the parties or that the agency had received the parties' filings, were also listed.[122]

Figure 6. Example of Docket from FMC's Website[123]

13-07 - Global Link Logistics Inc. v. Hapag-Lloyd AG

Last Updated: 4/14/2015

Sort by Document Number Ascend

In order to change display order, please use Sort By drop down

Document Number	Document Serve Date	Description	File Format Options
1	9/10/2013	Received Verified Complaint.	
2	9/13/2013	**Served Notice of Filing of Complaint and Assignment.**	
3	9/19/2013	Notice of Filing of Complaint and Assignment appeared in **Federal Register 78; FR57633. (initial decision due: September 15, 2014; final decision due: March 16, 2015).**	
4	9/23/2013	**Served Notice of Assignment of ALJ Clay G. Guthridge.**	
5	9/23/2013	**Served Initial Order.**	
6	10/1/2013	**Served Notice of Suspension of Filing Deadlines [due to government shut-down].**	
7	10/17/2013	Received Motion to Dismiss.	
8	11/1/2013	Received Global Link Logistics, Inc.'s Opposition to Respondent's Motion to Dismiss.	
9	11/8/2013	Received Respondent's Reply to Global Link Logistics, Inc.'s Opposition to Motion to Dismiss.	
10	3/12/2014	Received Response to Notice to Parties Regarding 2012 Service Contract. **(CONFIDENTIAL)**	
11	4/17/2014	**Served Initial Decision Granting Respondent's Motion to Dismiss. (exceptions due: May 9, 2014; replies to exceptions due: June 2, 2014).**	
12	5/2/2014	Received Global Link Logistics, Inc.'s Motion to Enlarge Time for Filing Exceptions	

Other agencies' adjudication sections did not group decisions and supporting adjudication materials together, even if they did maintain all three types of adjudicatory materials. The section of DOL's website dedicated to the department's Administrative Review Board, for example, contained a host of decisions dating back to 1996 (the year of EFOIA's enactment), all available in PDF or HTML format.[124] Although no supporting materials accompanied the decisions, a select number of briefs were accessible from two separate sections on the page.[125]

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[122] *13-07 – Global Link Logistics Inc. v. Hapag-Lloyd AG*, FED. MARITIME COMM'N (last updated April 14, 2015), http://www.fmc.gov/13-07/.

[123] *Id.*

[124] *USDOL/OALJ Reporter: Decisions of the Administrative Review Board by Date – May 1996 to Present, Administrative Review Board*, U.S. DEPT. LABOR (last visited Dec. 21, 2016), http://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBINDEX.HTM; *USDOL/OALJ Reporter: Decisions of the Administrative Review Board by Name of First Non-DOL Party, Administrative Review Board*, U.S. DEPT. LABOR (last visited Dec. 21, 2016), http://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/ARBLIST_ALPHA3.HTM.

[125] *Board Briefs, Administrative Review Board*, U.S. DEPT. LABOR (last visited Dec. 21, 2016), https://www.dol.gov/arb/briefs.htm; *Recent Postings, Administrative Review Board*, U.S. DEPT. LABOR (last visited Dec. 21, 2016), https://www.dol.gov/arb/welcome.html.

While many websites disclosed all or seemingly all adjudicatory decisions, others, such as SSA's[126] and, as mentioned above, PBGC's websites, only disclosed "significant" or "precedential" decisions.[127] Agencies that follow this practice presumably take their cue from the prevailing interpretation of § 552(a)(2)(A), and indeed the reason behind such a policy is likely similar to the reason the Attorney General originally interpreted that provision as only applying to precedential decisions: the impracticability of maintaining copies of every decision issued by an agency in agency reading rooms.[128] Of course, the Attorney General issued this interpretation in the days before electronic reading rooms. Disclosing non-precedential along with precedential decisions today would surely be less impracticable than it was in 1966.

Half of the websites surveyed did not post supporting adjudication documents on their websites. The value of an agency's adjudication section, from the standpoint of transparency, is greatly increased by the inclusion of supporting adjudication materials. That said, while this report recommends that agencies disclose such records on their websites, it is certainly not intended to imply that websites that do not do so necessarily maintain poor adjudication sections. FMSHRC's website, for example, did not contain supporting adjudicatory materials.[129] Even so, the website's library of Commission and ALJ decisions[130] was one of the most extensive and orderly decisional libraries surveyed.

Lastly, one agency, OMHA, did not disclose any decisions or supporting adjudication materials on its website (or, rather, on its section of the larger Department of Health & Human Services website). OMHA's decision to not post adjudicatory materials online is likely supported by law and understandable policy concerns. For example, FOIA Exemption 6 exempts from mandatory disclosure medical and personnel files if disclosing such materials "would constitute a clearly unwarranted invasion of personal privacy."[131] Under this exemption, courts have upheld the nondisclosure of information about patients' medical conditions and Medicare records.[132] OMHA is therefore likely not in violation of FOIA. Nevertheless, given that OMHA is second

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[126] SSA's unique disclosure practice is discussed in Part IV.C, *infra*.

[127] *Appeals Board Decisions*, PENS. BEN. GUAR. FUND (last visited Jan. 6, 2017), http://www.pbgc.gov/prac/appeals-board/appeals-decisions.html (claiming that the website only discloses decisions of its Appeals Board that the agency considers "significant or relevant to a large number of participants."); *Preface, Rulings*, SOC. SEC. ADMIN. (last visited Jan. 11, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-pref.html (stating that Social Security Rulings, in which certain adjudication decisions are memorialized, "make available to the public a series of precedential decisions relating to Federal old-age, survivors, disability, supplemental security income, and black lung benefits programs").

[128] *See* Memorandum on the Public Information Section of the APA, *supra* note 39, at 15.

[129] As referenced in note 90, *supra*, the FMSHRC website does provide audio files of oral arguments. *See Oral Arguments*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Dec. 20, 2016), https://www.fmshrc.gov/meetings-arguments/arguments. However, such audio files do not fall within the report's definition of supporting adjudicatory materials.

[130] *Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Dec. 29, 2016), https://www.fmshrc.gov/decisions; *Cases on Review*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Dec. 29, 2016), https://www.fmshrc.gov/content/cases-review.

[131] 5 U.S.C. § 552(b)(6).

[132] *See* U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 6, at 420, 480 (2009 ed.) (discussing and citing relevant cases).

only to SSA in the number of hearings conducted by ALJs, it is at least notable that it does not post decisions or supporting adjudication materials on its website.[133]

Other agencies harbor concerns about disclosing sensitive information, but these concerns do not prevent them from posting adjudication materials on their websites. Many agencies redact personal identifiers or sensitive information from decisions.[134] For example, decisions of DOL's Employees' Compensation Appeals Board issued after August 1, 2006, do not display the full names of claimants. References are limited to claimants' first and last initials.[135] Agencies that maintain reservations about posting decisions containing sensitive information may well consider adopting policies similar to those of DOL or other agencies. Doing so would allow them to strike the right balance between safeguarding the privacy interests of individuals and entities that are party to their proceedings on the one hand, while shining light on the agency's practices and governing laws and procedures on the other.

2. Interviews

Agency disclosure practices vary. This variation may be due to any number of reasons. Resource constraints, stakeholder views, staffing levels, and other factors unique to each agency surely play a role. This study, however, revealed that a handful of agencies do disclose all or at least all significant decisions and adjudicatory materials on their websites. In order to understand the costs and benefits to agencies in maintaining comprehensive or near-comprehensive online adjudication sections, and to discover if other agencies could achieve similar results, I reached out to personnel from a handful of those agencies in a series of e-mail and telephone conversations. The conversations indicated that, although maintaining extensive online libraries of adjudicatory decisions and supporting materials may impose upfront costs, agencies may reap dividends, financial or otherwise, in the long term from doing so.

The employees I spoke with represented FMC, CPSC, and NLRB, three agencies that disclose all or nearly all adjudication materials on their websites. I asked each employee two general questions. First, I inquired as to the costs incurred by his or her agency in maintaining its website's adjudication section, in a hard dollar figure or in terms of manpower. Second, I asked each employee to articulate the perceived benefits to his or her agency and agency stakeholders in

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[133] In the interest of avoiding painting an inaccurate picture of the Department of Health & Human Services' disclosure practices relative to Medicare decisions, it should be noted that the Medicare Appeals Council (a component of the Departmental Appeals Board and the last level of administrative proceedings for Medicare proceedings) *does* post certain significant decisions online. *See Medicare Appeals Council (Council) Decisions, Decisions, DAB*, MEDICARE APP. COUNCIL, DEPT. OF HEALTH & HUMAN SERVS. (last visited Jan. 11, 2017), https://www.hhs.gov/about/agencies/dab/decisions/council-decisions/index.html.

[134] PBGC, for example, deletes personal identifiers from the decisions of its Appeals Board. *Appeals Board Decisions*, PENS. BEN. GUAR. CORP. (last visited Dec. 29, 2016), http://www.pbgc.gov/prac/appeals-board/appeals-decisions.html. While NLRB maintains a large collection of motions, briefs, and other supporting materials, many documents, including many complaints and responsive pleadings that contain information required to be redacted, are only available to the public pursuant to FOIA records requests. Email of Elizabeth Kilpatrick, Asst. Gen. Counsel, Div. of Ops.-Mgmt., Nat'l Labor Rel. Bd., to Daniel Sheffner, Att'y Advisor, Admin. Conf. of the U.S. (Dec. 28, 2016, 2:52 p.m. EST) (on file with author).

[135] *Board Orders and Decisions, Employees' Compensation Appeals Board*, U.S. DEPT. LABOR (last visited Dec. 29, 2016), https://www.dol.gov/ecab/decisions.htm.

maintaining a comprehensive or nearly comprehensive library of adjudicatory decisions and supporting materials on its website.[136]

At the time of our exchanges, the interviewees were unable to place a specific dollar figure on the costs of maintaining their agencies' online adjudication sections. The NLRB employee I e-mailed indicated that about three to five employees are engaged in the overall maintenance and operation of the various systems involved in running NLRB's website.[137] She estimated that the aggregate staffing expense in maintaining the adjudication component is equal to approximately two to three "full-time equivalents" per year.[138] The CPSC official I spoke with reported that much of the cost of maintaining CPSC's adjudication section is embedded in the agency's external contract for web services, and that only one or two staff attorneys are charged with coordinating with the communications office to post new filings on CPSC's website.[139] For her part, the FMC official I spoke with estimated that her agency's adjudication section costs only about $1,000 annually to maintain.[140] One employee (a grade 8 on the General Schedule payment scale) spends about one-third of each day uploading and posting documents to the agency's website.[141]

The interviewees were certain that maintaining comprehensive or near-comprehensive adjudication sections was beneficial to their agencies and stakeholders. The CPSC and FMC officials both acknowledged that attorneys practicing before their respective agencies closely follow developments in adjudicative proceedings in which they are not involved.[142] The latter commented that if her agency did not disclose all adjudication materials on its website, it would invariably receive disclosure requests from members of the FMC bar.[143] A second CPSC employee reported that posting adjudication materials on the agency's website was the most efficient way of complying with the agency's regulations governing public inspection of its adjudication dockets.[144] Lastly, the NLRB employee I e-mailed informed me that dissemination of the various orders, opinions, and supporting materials on NLRB's website provides parties and non-parties alike with greater access and insight into the agency's processes, which, hopefully,

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[136] The second question (as it was e-mailed) also included a reference to "other" documents disseminated on agency websites. This category, however, was not ultimately included in the final analysis of the surveys' findings, nor did the recipients specifically speak to any "other" materials in their responses.

[137] Email of Elizabeth Kilpatrick, Asst. Gen. Counsel, Div. of Ops.-Mgmt., Nat'l Labor Rel. Bd., to Daniel Sheffner, Att'y Advisor, Admin. Conf. of the U.S. (Dec. 2, 2016, 9:36 a.m. EST) (on file with author).

[138] *Id.* A full-time equivalent, or FTE, is calculated as the total hours worked in a job divided by the number of hours in a full-time schedule. Peter R. Orszag, Dir., Office of Mgmt. & Budget, Memorandum for the Heads of Departments and Agencies, Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009, at 34 (June 22, 2009).

[139] Telephone Interview with Scott Wolfson, Commc'n Dir. & Senior Advisor to the Chairman, Consumer Prod. Safety Comm'n (Dec. 21, 2016).

[140] Telephone Interview with Official at Fed. Maritime Comm'n (Jan. 3, 2017). FMC's webmaster functions are handled internally, with the help of the hosting site. *Id.*

[141] *Id.*

[142] Telephone Interview with Scott Wolfson, Commc'n Dir. & Senior Advisor to the Chairman, Consumer Prod. Safety Comm'n (Dec. 21, 2016); Telephone Interview with Rachel E. Dickon, Asst. Sec'y, Fed. Maritime Comm'n (Jan. 3, 2017).

[143] Telephone Interview with Official at Fed. Maritime Comm'n (Jan. 3, 2017).

[144] Email of Official at Consumer Prod. Safety Comm'n, to Daniel Sheffner, Att'y Advisor, Admin. Conf. of the U.S. (Dec. 20, 2016, 1:01 p.m. EST) (on file with author). She also acknowledged that it allowed for immediate public access to the agency's adjudicatory information. *Id.*

inspires public trust.[145] She also noted that posting materials online translates to lower printing costs and fewer FOIA requests.[146]

The agency employees' responses reveal that agencies that do not already do so may be able to build and maintain comprehensive or near-comprehensive adjudicatory sections at minimal cost. Of course, all agencies are diverse and subject to unique constraints, so this conclusion is surely subject to qualification. That said, FMC, CPSC, and NLRB differ in many important respects, most notably in terms of size, focus, and caseload;[147] yet, none of the interviewees indicated that maintaining comprehensive or near-comprehensive adjudication sections was cost-prohibitive. In fact, they all articulated several benefits to their agencies which appear to outweigh any costs (monetary or otherwise), whether they be in the form of time or money saved through the avoidance of excessive FOIA requests or printing costs, or efficient compliance with internal transparency requirements, or else the countless benefits engendered by increased public trust and stakeholder satisfaction.

IV. CASE STUDIES

This Part presents a more detailed analysis of agency disclosure practices and navigation tools by examining the websites of three agencies—FTC, FMSHRC, and SSA. Each website sits at a different point on the continuum of comprehensiveness and navigability revealed during this study. These case studies help inform the recommendations offered in this report and, thus, hopefully ensure that they are acceptable to all agencies, tailored as they must be to the unique situations and constraints of each. All three of the websites discussed below possess virtues separate and apart from their disclosure practices. Nothing in this or any other part of the report, therefore, should be taken as an assessment of the websites' overall qualities. That said, some websites are more comprehensive and navigable than others, and FTC, FMSHRC, and SSA's websites provide demonstrable examples of this reality.

A. Federal Trade Commission

1. Adjudication Overview

FTC's adjudication proceedings largely consist of enforcement actions authorized by the Federal Trade Commission Act (FTCA).[148] The procedural formality and complexity of the agency's proceedings, conducted under the APA's formal hearing provisions, resemble litigation

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[145] Email of Elizabeth Kilpatrick, Asst. Gen. Counsel, Div. of Ops.-Mgmt., Nat'l Labor Rel. Bd., to Daniel Sheffner, Att'y Advisor, Admin. Conf. of the U.S. (Dec. 2, 2016, 9:36 a.m. EST) (on file with author).
[146] *Id.*
[147] FMC, at around 122 employees, is much smaller than CPSC (~536) and NLRB (~1,573). *See Employment Cubes, March 2016, FedScope*, U.S. OFF. PERS. MGMT. (last visited Jan. 3, 2017), https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll. Additionally, NLRB and FMC have higher adjudication caseloads than CPSC. CPSC's adjudication section contains five cases (albeit with upwards of 500 adjudication materials), all of which began in 2012. *Recall Lawsuits: Adjudicative Proceedings*, U.S. CONSUMER PROD. SAFETY COMM'N (last visited Jan. 3, 2017), https://www.cpsc.gov/Recalls/Recall-Lawsuits/Adjudicative-Proceedings. Compare that to the zero cases it was engaged in between 2001 and 2012. Telephone Interview with Scott Wolfson, Commc'n Dir. & Senior Advisor to the Chairman, Consumer Prod. Safety Comm'n (Dec. 21, 2016).
[148] 15 U.S.C. §§ 41–58.

in federal court.[149] Parties are generally represented by counsel. ALJs hold prehearing conferences, resolve discovery disputes, oversee motion practice, and preside over full evidentiary hearings. Following a hearing, the ALJ issues an initial decision. Parties may appeal an ALJ's decision to the Commission,[150] which then issues a final decision. Appeals may also be initiated on the Commission's own motion.[151]

FTC proceedings are often factually complex and may implicate a wide variety of industry practices. Cases include actions to enforce the FTCA's prohibition of unfair or deceptive acts or practices, as well as of unfair methods of competition; the Clayton Antitrust Act's[152] proscription against unlawful corporate mergers, interlocking directorates, and certain discriminatory pricing and product promotion practices; and the disclosure requirements of the Textile Fiber Products Identification Act.[153] Remedies available in actions brought by the agency include cease and desist orders, findings of violation or non-compliance, divestiture, and enjoinment from importing wool, fur, or textile fiber goods.[154]

2. Online Dissemination of Adjudication Materials

a. Navigability

The main search engine on FTC's website, located on the top right-hand corner of the homepage, allows users to focus their searches specifically on adjudicatory materials. Users are able to sort results by relevancy or title and to filter by "Content Type," "Date," and "Site."[155] The "Content Type" scroll box offers several different "types" or categories with which users can focus their searches. Conducting a search while filtering by the "Cases," "Commission Decision Volume," or "Petition to Quash" content types will generate a list of adjudication materials that can be found in correspondingly named pages of the website's adjudication section.[156] Filtering by "Cases" will produce links to administrative and federal court dockets that house decisions and relevant supporting adjudication materials. Filtering by "Commission Decision Volume" produces links to scanned volumes of the *Federal Trade Commission Decisions* reporter series. The compilation, first published in 1920, contains Commission decisions dating from 1915 to the

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[149] *FTCAADJU0001, Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Dec. 4, 2016), http://acus.law.stanford.edu/scheme/ftcaadju0001.
[150] 16 C.F.R. § 3.52(b).
[151] *Id.* § 3.53. Additionally, FTC regulations provide for automatic review by the Commission of an ALJ decision in proceedings in which the Commission sought preliminary relief in a parallel federal court proceeding, even if no notice of appeal has been filed. *Id.* § 3.52(a).
[152] 15 U.S.C. §§ 12–27.
[153] *Id.* §§ 70–70k.
[154] A full list of FTC's case types can be found on the *Federal Administrative Adjudication* database. *See FTCAADJU001-Case Type 1, FTCAADJU001-Case Type 2, FTCAADJU001-Case Type 3, FTCAADJU001-Case Type 4, FTCAADJU001-Case Type 5, FTCAADJU001-Case Type 6, FTCAADJU001-Case Type 7, FTCAADJU001-Case Type 8, Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Dec. 4, 2016), http://acus.law.stanford.edu/scheme/ftcaadju0001.
[155] *See Search Results, Search FTC*, FED. TRADE COMM'N (last visited Dec. 30, 2016), https://www.ftc.gov/search/site/adjudication.
[156] *Id.*

present-day.[157] Filtering by "Petitions to Quash" limits searches to petitions to limit or quash subpoenas and civil investigative demands, and related documents.

The website also maintains a helpful site map on its homepage. The site map rests at the bottom of the homepage (and indeed of every page on the website). It consists of links to the different sections of the FTC website that correspond with the links located on the horizontal bar at the top of the homepage.[158] Underneath each of these main links are additional links that, if selected, direct users to the subpages of the main sections of the website. For example, to access adjudication materials, a user may click the "Enforcement" link on the site map, which will then transport the user to the main page of the "Enforcement" section. From there, the user can navigate to adjudication materials by clicking on the "Cases and Proceedings" link on the left-hand side of the page. Alternatively, instead of selecting "Enforcement" on the site map, the user could go directly to the "Cases and Proceedings" page by clicking on the identically named link located directly beneath the "Enforcement" link.

All adjudication materials are located on the "Cases and Proceedings" page. The page can be accessed through resort to the "Enforcement" link on the horizontal banner at the top of the homepage or, as just discussed, the site map.[159] The "Cases and Proceedings" page offers a list of approximately 2,700 cases organized by the date the cases were last updated. Cases may also be organized alphabetically by name.[160] Both administrative and federal court proceedings are listed, with each case identified as either "Administrative" or "Federal." [161] Clicking on a case will take the user to a docket page that contains a case summary, the date the case page was last updated, the "FTC Matter/File Number," and the case's docket number. Underneath the "Case Timeline" heading, users will find links to orders, opinions, and supporting adjudication materials issued and filed in that case, all in PDF format. The records are listed by date of issuance or filing in reverse chronological order.[162]

A special search function on the left-hand side of the page allows users to search within the "Cases and Proceedings" page. Users may filter searches by "Mission" ("Competition" or "Consumer Protection"), "Type of Action" (federal or administrative), and "Enforcement Type" (e.g., administrative complaints or civil penalties). Users may further choose to arrange cases by

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[157] For the most recent version available as of the date of this report, see FED. TRADE COMM'N, FEDERAL TRADE COMMISSION DECISIONS: FINDING, OPINIONS, AND ORDERS Vol. 159 (Jan.–June 2015), *available at* https://www.ftc.gov/system/files/documents/commission_decision_volumes/volume-159/vol159.pdf.

[158] The only exception is the "Site Information" link on the site map. There is no such link on the horizontal bar. FED. TRADE COMM'N (last visited Dec. 30, 2016), https://www.ftc.gov/.

[159] Users may also make their way to the "Cases and Proceedings" page via the website's "FOIA Reading Rooms" subsection. Accessible through the "FOIA" link on the "About the FTC" page, users must then click on the "FTC Opinions and Orders" and then "Commission Actions" links. *FOIA Reading Rooms*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/about-ftc/foia/foia-reading-rooms. All executive agency websites contain pages dedicated to FOIA. Some of the websites included in this study contained FOIA pages that linked to § 552(a)(2)(A) adjudicatory decisions. In most cases, if a FOIA section provided access to decisions at all, it did so through a link to the website's separate adjudication section(s).

[160] *See Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings.

[161] *Id.*

[162] *See, e.g.*, *1-800 Contacts, Inc, In the Matter of*, *Cases and Proceedings*, FED. TRADE COMM'N (last updated Dec. 30, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter.

"released date" or "updated date."[163] An "Advanced Search" option allows for more sophisticated filtering, such as by topic, matter number, and industry.[164]

Users are not limited in their search for adjudication materials to the main "Cases and Proceedings" page. Several links on the left-hand side of the page enable users to further filter or organize their searches. The aforementioned "Petitions to Quash" and "Commission Decision Volumes," which are optional filters on the main search engine, are available to those users who wish to narrow their searches to either documents relevant to actions to quash or limit subpoenas or civil investigative demands, or to decisions of the Commission, respectively.[165] The "Adjudicative Proceedings" link contains a list of cases organized in exactly the same fashion as the main "Cases and Proceedings" page, but without federal court cases.[166] Additionally, the "Case Document Search" subpage, also located on the left-hand side of the "Cases and Proceedings" page, arranges decisions and supporting adjudicatory materials by the records themselves, instead of grouped together by case.[167]

b. Adjudication Materials

A scan of the documents posted in any given case page reveals the formal and procedurally complex structure of FTC adjudication proceedings. Decisions disposing of procedural and substantive motions line the virtual shelves of the FTC website. PDF copies of hearing level scheduling orders, orders disposing of a variety of motions (including those related to discovery), and initial decisions can be found with relative ease, whether one is using the main search engine or is searching within the "Cases and Proceedings" page. Commission-level appellate decisions, both procedural orders and final dispositions, are also available. For example, the docket page for *In re Penn State Hershey Medical Center* paints a picture of the diversity of decisions one can find on the website; there are no fewer than 17 decisions listed in the docket page, from the order designating the ALJ to the Commission's dismissal of the complaint.[168] The earliest available

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[163] *Cases and Proceedings*, FED. TRADE COMM'N (last visited Jan. 22, 2017), https://www.ftc.gov/enforcement/cases-proceedings.

[164] *Cases and Proceedings: Advanced Search*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings/advanced-search.

[165] *Petitions to Quash*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings/petitions-quash; *Commission Decision Volumes*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings/commission-decision-volumes.

[166] *Adjudicative Proceedings*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings/adjudicative-proceedings?combine=&field_mission_tid=All&field_enforcement_type_tid=All&date_filter[min]=&date_filter[max]=.

[167] *Case Document Search*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Jan. 2, 2017), https://www.ftc.gov/enforcement/cases-proceedings/case-document-search. The "Petitions to Quash," "Adjudicative Proceedings," and "Case Document Search" subpages allow users to filter results in similar fashions as allowed by the main "Cases and Proceedings" page, thus ensuring that more sophisticated users can further focus their searches with more specificity. They do not, however, offer similar advanced searching options.

[168] *The Penn State Hershey Medical Center/PinnacleHealth System*, *Cases and Proceedings*, FED. TRADE COMM'N (last updated Oct. 23, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0191/penn-state-hershey-medical-centerpinnaclehealth-system.

decisions are mostly from the early to mid-1990s, although much earlier decisions can be found,[169] most notably from the "Commission Decision Volume" page.

FTC's website would be impressive even if the types of materials accessible from its adjudication section were limited to its diverse collection of first line and appellate decisions. But the "Cases and Proceedings" page goes a step further by posting a seemingly comprehensive collection of supporting adjudication materials, as well. On each case page, as well as on the "Case Document Search" page, users may access PDF copies of a variety of pleadings, motions, notices, witness lists, exhibits, and other materials. The docket page for *In re McWane, Inc. and Star Pipe Products, Ltd.*, for instance, contains well over 100 supporting administrative materials, ranging from the administrative complaint and responsive pleadings, to various substantive and procedural motions, supporting briefs, and other types of records.[170]

B. Federal Mine Safety & Health Review Commission

1. Adjudication Overview

FMSHRC's adjudication proceedings largely consist of formal APA hearings arising under the Federal Mine Safety and Health Act of 1977 (Mine Act).[171] ALJs oversee discovery disputes, motion practice, and full evidentiary hearings. Parties may appeal ALJ decisions to the Commission for appellate review, or the Commission may review a case on its own motion. ALJs may oversee "simplified proceedings" in certain civil penalty contests.[172] Parties to simplified proceedings are not required to file answers, are largely barred from filing motions, and may not engage in discovery other than as ordered by the ALJ.[173]

Cases adjudicated before FMSHRC include mine operators' appeals of citations, orders, and proposed penalties issued by DOL's Mine Safety and Health Administration (MSHA), as well as complaints by miners of unlawful discharge, discrimination, and interference.[174] Private prevailing parties may recover attorneys' fees and costs, monetary awards, relief from findings of violation, and other remedies. MSHA and the Secretary of DOL may recover civil penalties, injunctive relief, and other relief in actions they initiate.[175]

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[169] *See Adjudicative Proceedings*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Jan. 1, 2017), https://www.ftc.gov/enforcement/cases-proceedings/adjudicative-proceedings. One can find decisions issued as early as the 1960s among the cases listed on the main "Cases and Proceedings" page. *See, e.g.*, *Transair, Inc. et al.*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Jan. 1, 2017), https://www.ftc.gov/enforcement/cases-proceedings/transair-inc-et-al. (providing link to PDF copy of the Commission's decision in *In re Transair, Inc., et al.*, 60 F.T.C. 694 (April 5, 1962)). Cases prior to the 1990s do not appear to post more than the final decision.

[170] *McWane, Inc., and Star Pipe Products, Ltd., In the Matter of*, *Cases and Proceedings*, FED. TRADE COMM'N (last updated April 17, 2015), https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter.

[171] Pub. L. No. 95-164, 91 Stat. 1290 (March 9, 1978).

[172] 29 C.F.R. § 2700.100(a).

[173] *Id.* § 2700.100(b).

[174] 29 C.F.R. pt. 2700, subpts. B, C, D, E.

[175] *See FMSHFADJ0001*, *Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Jan. 4, 2017), http://acus.law.stanford.edu/scheme/fmshfadj0001.

2. Online Dissemination of Adjudication Materials

a. Navigability

The main search engine on FMSHRC's website is located on the top right-hand corner of the homepage.[176] As with FTC, the search engine on FMSHRC's website allows users to focus their results on adjudicatory materials. On the left-hand side of the search results page are four categories of filters: "Everything" (the default "filter"), "Images," "Commission Decisions," and "ALJ Decisions."[177] The latter two filters limit results generated by the search engine to decisions issued by the Commission and FMSHRC ALJs, respectively. The search results page also offers an "Advanced Search" option that allows for further filtering. On the advanced search page, users may narrow their searches by words and phrases, as well as by file type (e.g., PDF).[178]

The website's search engine is in some ways easier and more helpful to users who are searching for adjudication materials than FTC's main search engine. Users must sift through several categories of filters to locate the "Cases," "Commission Decision Volume," and "Petition to Quash" filters on FTC's search results page. By contrast, the "Commission Decisions" and "ALJ Decisions" filters, two of only four possible options, are clearly visible on the FMSHRC website's search results page. Of course, FMSHRC's jurisdiction is much more limited than FTC's, focused as it is on the adjudication of disputes arising under the Mine Act. FTC, on the other hand, promulgates regulations with industry-wide impact[179] and engages in a number of investigative and policymaking activities in addition to adjudicating enforcement proceedings. FTC's website, therefore, caters to a more diverse group of users than FMSHRC's, and so must by necessity offer more search options.[180] Even so, FMSHRC's website provides a good example of a simple yet effective search engine.

The FMSHRC website does not maintain either a site map or an index. Site maps and indexes were of course revealed by the surveys to be useful in locating the adjudication sections of agency websites. The lack of such tools on the website does not, however, render a user's navigation to the agency's adjudication sections difficult. Links to Commission and ALJ decisions are accessible from the "Decisions" page of the website, which itself is accessible from a link on the banner of the homepage.[181] FMSHRC's website maintains two other adjudication sections

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[176] FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 4, 2017), https://www.fmshrc.gov/. It is powered by the Bing search engine. *See* BING (last visited Jan. 4, 2017), http://www.bing.com/.

[177] *Search Results*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 4, 2017), https://search.usa.gov/search?query=ALJ&submit.x=0&submit.y=0&submit=Send&affiliate=fmshrc.

[178] *Advanced Search*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 4, 2017), https://search.usa.gov/search/advanced?affiliate=fmshrc&enable_highlighting=true&per_page=20&query=ALJ.

[179] FTC, however, is far more inclined to engage in adjudication than substantive rulemaking to achieve policy ends. *See* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1859–63 (2015).

[180] FMSHRC is also much smaller than FTC, employing fewer than 100 employees. *RS-Federal Mine Safety and Health Review Commission, Employment Cubes, March 2016, FedScope*, U.S. OFF. PERS. MGMT. (last visited June 4, 2017), https://www.fedscope.opm.gov/ibmcognos/cgi-bin/cognosisapi.dll.

[181] *Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), https://www.fmshrc.gov/decisions. As with the FTC's "Cases and Proceedings" page, one may also venture to the "Decisions" page through the website's FOIA page, accessible through the "FOIA" link on the banner of the homepage. *Freedom of Information Act (FOIA)*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), https://www.fmshrc.gov/foia. From that page, the "E-Reading Room" link at the bottom will take one to a

that are accessible from the banner—the "Review Commission Arguments & Meetings"[182] and "Cases on Review" pages[183]—neither of which post adjudication materials. While a user may feel inclined to venture to one or both of these pages in search of adjudication materials, a quick scan of either will reveal the futility of such a search. In any event, the descriptively titled "Decisions" link on the banner of the homepage is very identifiable and easy to find.

The "Decisions" page is divided into three subpages. The first subpage, "Review Commission Decisions," contains copies of orders and decisions issued by the agency's Commission from 1978 to the present.[184] Records, available in PDF format (and HTML as well for recent decisions), are listed in reverse-chronological order. A search engine is available for searching within the subpage. More sophisticated users can utilize the optional filters underneath the search engine to filter their searches by type of record (order or decision), the parties, docket number, and start and end dates.[185] The "ALJ Decision" page is identical to the "Review Commission Decisions" page, save that it contains copies of ALJ orders.[186]

The last subpage on the "Decisions" section, entitled "Blue Books," contains links to installments of the agency's *Blue Books* publications. These publications, issued in monthly installments since March 1979, contain all Commission decisions and all or most ALJ decisions.[187] Links to each monthly publication are grouped together by year. Users can locate the volumes in which a specific decision is published by entering the case's citation in a specialized search engine at the top of the page.

b. Adjudication Materials

The materials available within the three aforementioned subpages consist of all or nearly all Commission and ALJ decisions. A search will therefore turn up a variety of decisions, including ALJ orders granting or denying motions for summary decision, dismissal, or petitions for civil penalties, as well as Commission opinions on review of such decisions. FMSHRC's website is therefore an invaluable repository of adjudicatory decisions.

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page that contains a whole host of links to sections of the website that contain links to materials required to be disclosed by 5 U.S.C. § 552(a)(1) and (2). *E-Reading Room, Freedom of Information Act (FOIA)*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), https://www.fmshrc.gov/foia/e-reading-room. The first set of links directs users to the subsections of the "Decisions" page.

[182] *See Review Commission Arguments & Meetings*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 4, 2017), https://www.fmshrc.gov/meetings-arguments. The page offers links to oral argument recordings and Commission meeting notices and recordings.

[183] *Cases on Review*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 4, 2017), https://www.fmshrc.gov/content/cases-review.

[184] *Review Commission Decisions, Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), https://www.fmshrc.gov/decisions/commission.

[185] *Id.*

[186] *ALJ Decisions, Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), https://www.fmshrc.gov/decisions/alj.

[187] *Blue Books, Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 5, 2017), http://www.fmshrc.gov/decisions/bluebook. The other two sections ("Review Commission Decisions" and "ALJ Decisions") consist of the Commission and ALJ decisions issued in the *Blue Books*.

FMSHRC, just like half of the agencies surveyed, did not post copies of supporting adjudication materials on its website. The agency does, as briefly discussed above, hold simplified proceedings for certain noncomplex civil penalty contests.[188] These proceedings require considerably fewer filings by the parties than do standard proceedings. Depending on the prevalence of simplified proceedings, the number of supporting adjudication materials filed in FMSHRC proceedings may be small. There is no data, however, to confirm whether this assumption is correct.

C. Social Security Administration

1. Adjudication Overview

SSA oversees an enormous adjudication system. Roughly 1,300 ALJs (over 80% of the total ALJ workforce) conduct hundreds of hearings in more than 160 hearing offices throughout the country.[189] The vast majority of cases involve claims for disability benefits under the agency's Social Security Disability Insurance and Supplemental Security Income programs.[190] Benefits hearings are informal and nonadversarial.[191] About 78% of claimants are represented.[192] At the conclusion of a hearing, the ALJ issues a written decision granting or denying benefits, which may be appealed to SSA's Appeals Council for remand or final decision.[193] If the Appeals Council does not grant review, the hearing decision constitutes the agency's final decision.[194]

2. Online Dissemination of Adjudication Materials

a. Navigability

SSA is the administrator of the country's largest social insurance program. Reflecting this fact, its website is designed mainly for the benefit of potential and current social security beneficiaries, not individuals searching for adjudication decisions. Links to benefit applications, cost-of-living adjustment information, and other program-related information are prominently displayed on the website's homepage. No descriptively titled banner link directs the user to adjudication materials. While there are both a search engine and a sitemap on the homepage,

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[188] *See* 29 C.F.R. § 2700.101.

[189] *See* SOC. SEC. ADMIN., PUB. NO. 13-11700, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2.80 tbl. 2.F8 (2015), *available at* https://www.ssa.gov/policy/docs/statcomps/supplement/2015/supplement15.pdf. [hereinafter 2015 STATISTICAL SUPPLEMENT] (revealing that between 2012 and 2014 there were over 800,000 hearing level receipts annually); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654 (2016).

[190] *See* 2015 STATISTICAL SUPPLEMENT, *supra* note 189, at 2.81 tbl. 2.F9.

[191] 20 C.F.R. § 404.900(b); *see* Frank S. Bloch, et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 3 (2003).

[192] *SSAOBENE0001–Hearing Level–Procedures*, *Federal Administrative Adjudication*, ADMIN. CONF. OF THE U.S. (last visited Jan. 12, 2017), http://acus.law.stanford.edu/hearing-level/ssaobene0001-hearing-level-procedures.

[193] *See* 20 C.F.R. §§ 404.967, 405.370, 405.401. The Appeals Council may also review a decision on its own motion. *Id.* § 405.401(a).

[194] *Id.* § 404.981.

neither tool is very helpful in locating adjudicatory materials unless the user knows the unique manner in which SSA adjudication decisions are disclosed.[195]

SSA does not post copies of the original decisions of its ALJs and Appeals Council on its website. The agency's website is denoted in Table 1, above, as disclosing both first line and appellate decisions, however, because users can access copies of decisions from the website in the form of the agency's Social Security Rulings (SSRs).[196] SSRs, which are issued under the authority of SSA's Commissioner and are binding on the agency, are based on or consist of different sources of law or policy, including selected ALJ and Appeals Council decisions the agency deems precedential.[197] Decisions are not available in any other format from the website.

SSRs can be reached in multiple ways. Perhaps the most direct route is through the menu on the website's homepage. Below "Research, Policy & Planning" on the menu screen are several links, one of which is entitled "Program Rules."[198] Clicking that link will take the user to the "Current Program Rules" page, which in turn offers a link to the "Rulings" page.[199] The "Rulings" page contains comprehensive listings of the agency's SSRs and Acquiescence Rulings.[200]

SSRs can be accessed in several ways from the "Rulings" page. A table of contents divides SSRs into three categories: "Old Age and Survivor's Insurance," "Disability Insurance," and "Supplemental Security Income."[201] Selecting a hyperlinked-section will direct users to a page containing further categorical divisions, which categories in turn lead to pages offering links to all relevant SSRs.[202] Users may also locate SSRs through a cumulative index which discloses a list of rulings issued between 1960 and 2007 that are arranged alphabetically by subject matter,[203] or through a "Finding Lists" link that allows users to view yearly listings of rulings; superseded, rescinded, or modified rulings; and rulings based on court cases.[204]

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[195] *See supra* Part III.B.1.

[196] *See Rulings*, SOC. SEC. ADMIN. (last visited Jan. 11, 2017), https://www.ssa.gov/OP_Home/rulings/rulings.html.

[197] 20 C.F.R. § 402.35(b)(1); *Preface*, *Rulings*, SOC. SEC. ADMIN. (last visited Jan. 11, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-pref.html; *see, e.g.*, SSR 68-76a, Sections 216(i) and 22–Disability–Cessation of Disability, 20 C.F.R. § 404.1539(a) (rescinded 1975) (copy of Appeals Council decision); *see also* Lowry v. Soc. Sec. Admin., 2001 U.S. Dist. LEXIS 23474 (D. Ore. Aug. 29, 2001), at *20.

[198] *Menu*, SOC. SEC. ADMIN. (last visited Jan. 13, 2017), https://www.ssa.gov/site/menu/en/.

[199] *Current Program Rules*, SOC. SEC. ADMIN. (last visited Jan. 13, 2017), https://www.ssa.gov/regulations/.

[200] *Rulings*, SOC. SEC. ADMIN. (last visited Jan. 13, 2017), https://www.ssa.gov/OP_Home/rulings/rulings.html. Acquiescence Rulings provide guidance on how SSA will apply federal circuit court decisions that are at odds with the agency's national policies. *What are Acquiescence Rulings (ARs)?*, *Acquiescence Ruling Definition*, SOC. SEC. ADMIN. (last visited Jan. 13, 2017), https://www.ssa.gov/regulations/def-ar.htm. Rulings may also be found through the website's "FOIA Reading Room." *FOIA Reading Room*, *Freedom of Information Act (FOIA)*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/foia/readingroom.html. From that page, users can access a link to the "Rulings" page nested beneath the heading "Social Security Laws, Regulations, and Policies." *Id.*

[201] *Social Security Rulings and Acquiescence Rulings Table of Contents*, *Rulings*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-toc.html.

[202] *See, e.g.*, *Table of Contents*, *Old Age and Survivor's Insurance*, *Old Age Insurance Benefits*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/OP_Home/rulings/oasi/03/SSR-OASI03toc.html.

[203] *Cumulative Index (1960-2007)*, *Rulings*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-idx.html.

[204] *Finding Lists for Social Security Rulings and Acquiescence Rulings*, *Rulings*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-find.html.

b. Adjudication Materials

Only a small subset of SSRs qualify as adjudicatory materials for purposes of this study. SSRs may take many forms, based as they are on decisions of the Commissioner, opinions of the Office of General Counsel, policy interpretations, and federal court and administrative adjudication decisions.[205] SSRs based on adjudicative decisions either consist of summaries of decisions or word-for-word copies. Only the latter are "adjudicatory decisions" for purposes of this study.

SSA does not publish all adjudicatory decisions as SSRs. Decisions selected for inclusion in an SSR are those the agency deems precedential.[206] SSA, therefore, complies with the prevailing interpretation of FOIA's proactive disclosure requirement,[207] although not the expansive vision embodied by the other sources of federal law and policy discussed above.[208] There are several potential reasons the agency only discloses a limited number of decisions on its website. FOIA Exemption 6, of course, authorizes SSA to withhold records that, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy."[209] In electing whether or not to withhold information, the agency "weigh[s] the foreseeable harm of invading a person's privacy against the public interest in disclosure."[210] Perhaps SSA believes that, in the vast majority of cases, it would be too easy for someone to "piece together" the private information from a redacted decision.[211]

Another possible reason for SSA's limited disclosure policy may lie in the nature of documents filed and issued in disability proceedings. Perhaps there are few distinguishable differences in the factual and legal backgrounds of cases to warrant disclosing all or a significant number of its decisions online. Most ALJ decisions are written with the assistance of the agency's Findings Integrated Templates (FIT).[212] FIT, a measure designed to ensure the quality of ALJ decisions, provides ALJs with over 2,000 templates for purposes of composing their written decisions.[213] The use of these templates results in the inclusion of some amount of generic

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[205] *Social Security Ruling Definition, Current Program Rules*, SOC. SEC. ADMIN. (last visited Jan. 14, 2017), https://www.ssa.gov/OP_Home/rulings/rulings-find.html.
[206] *See Lowry*, U.S. Dist. LEXIS 23474, at *20.
[207] *See* PROACTIVE DISCLOSURES, *supra* note 37, at 16; *see also* Gilhooley, *supra* note 41, at 62 nn.53-54, 83.
[208] *See supra* Part I.B.1–5.
[209] 5 U.S.C. § 552(b)(6); *see* 20 C.F.R. § 402.100(a) ("We may withhold records about individuals if disclosure would constitute a clearly unwarranted invasion of their personal privacy.")
[210] 20 C.F.R. § 402.100(b).
[211] *See id.* ("[I]n our evaluation of requests for records we attempt to guard against the release of information that might involve a violation of personal privacy because of a requester being able to 'read between the lines' or piece together items that would constitute information that normally would be exempt from mandatory disclosure under Exemption Six."). That the agency accords a deep level of respect to individuals' privacy interests is evidenced by the fact that disability hearings are closed to the public. *See* Daniel F. Solomon, *Save the Social Security Disability Trust Fund! And Reduce SSI Exposure to the General Fund*, 36 NAT'L ASS'N ADMIN. L. JUDICIARY 142, 221 (2016) (writing that disability hearings are closed "because [SSA] is overly concerned with the Privacy Act of 1974.").
[212] *See generally* OFFICE OF THE INSP. GEN., SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REV., DECISION-WRITING PROC., AUDIT REPORT, A-02-09-19068 (Nov. 17, 2010).
[213] *Id.* at 2; *see* Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts 27 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

language in decisions, perhaps lessening the value of many decisions from the perspective of transparency.[214]

Of course, SSA's policy is also likely informed by the number of decisions it issues. In the Supreme Court's estimation, "[t]he Social Security hearing system is probably the largest adjudicative agency in the western world."[215] Millions of individuals apply for social security benefits each year.[216] Between FY 2011 and 2014, SSA ALJs issued between 680,963 and 820,848 decisions annually, with each ALJ issuing on average between 43 and 50 dispositions each month.[217] Disclosing all or significantly all decisions, therefore, may be viewed as too burdensome by the agency.

Additionally, SSA does not disclose supporting adjudication materials on its website. This may be for the same or additional reasons that it does not disclose all of its ALJ and Appeals Council decisions.[218]

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In sum, FTC, FMSHRC, and SSA's websites each represent different points along the continuum of comprehensiveness and navigability that was revealed during the study. FTC's website offers ordinary and sophisticated users alike a variety of ways to locate adjudication materials with its advanced search features and informative sitemap. Posting far more than the "final opinions . . . [and] orders" that FOIA requires be made available online, FTC disseminates all or nearly all ALJ and Commission decisions and supporting adjudicatory materials on its website. In this way, the agency satisfies the transparency and accountability aspirations of the FRA, PRA, OMB Circular A-130, E-Government Act of 2002, and President Obama's Open Government and FOIA Memoranda. That materials are accessible from one easy-to-locate adjudication section, grouped together by docket, and amenable to easy discovery through filtering and advanced search options further establishes FTC's online disclosure practices as worthy of replication by agencies with the justification and abilities, financial or otherwise, to do so.

FMSHRC's website also houses the agency's decisions in a single, easy-to-locate adjudication section. With a search engine on the homepage that, in its simplicity and effectiveness, allows users to easily focus their searches on either ALJ or Commission decisions, the website is highly navigable. Although the website does not disclose supporting adjudication materials, its orderly and navigable collections of decades' worth of ALJ and Commission decisions render it both FOIA-compliant and relatively robust.

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[214] Gelbach & Marcus, *supra* note 213, at 27.

[215] Barnhart v. Thomas, 540 U.S. 20, 28-29 (2003) (internal quotation marks and citation omitted).

[216] In 2015, claimants filed 2.7 million benefits applications. SOC. SEC. ADMIN., FY 2017 BUDGET OVERVIEW 11 (Feb. 2016), *available at* https://www.ssa.gov/budget/FY17Files/2017BO.pdf.

[217] 2015 STATISTICAL SUPPLEMENT, *supra* note 189, at 2.81, tbl. 2.F9, 2.80, tbl. 2.F8.

[218] The agency does not specify the records claimants must file with ALJs. *See* Harold J. Krent & Scott Morris, Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms 35 (April 3, 2013) (report to the Admin. Conf. of the U.S.). The Administrative Conference recommended that SSA require claimants' representatives (and permit self-represented claimants) to submit standardized pre-hearing briefs at the hearing stage in Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013).

SSA's website discloses a select number of decisions that the agency deems precedential. The manner in which decisions are disclosed—within SSRs—does not lend itself to easy navigation by a user unaware of this arrangement. Further, the website does not disclose any supporting adjudication materials. Therefore, while the website is seemingly in compliance with FOIA's proactive disclosure requirement, it not as comprehensive as FTC or FMSHRC's websites.

V. RECOMMENDATIONS

The following recommendations are based on observations formed from my examination of the practices of the 24 websites surveyed as part of this study, particularly the case study websites discussed in Part IV. They are presented 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. The recommendations, however, have been designed to encourage agencies to increase access to adjudication materials consistent with the objectives of FOIA and other relevant federal laws and policies, and thereby are hopefully of use to agencies interested in increasing the accessibility of adjudication materials on their websites and improving their disclosure practices. The recommendations are intended to be modest, and I believe they can be implemented at minimal cost to the agencies. In any event, any costs incurred would hopefully be accompanied by any number of offsetting benefits.

The following recommendations were formed from my examination of a comparative handful of agency websites. Many of the websites already comply with some or all of the recommendations, and surely other websites I did not survey do as well. These recommendations, therefore, are directed at those agencies that do not already engage in any or some of the recommended practices, and that wish to improve their online disclosure practices and increase the accessibility of their adjudication materials.

Recommendation 1. Agencies should consider maintaining links on their websites to copies of all decisions and supporting records issued and filed in adjudication proceedings. In determining which materials to disclose, agencies should take into account the following factors: (a) the interests of the public and relevant stakeholders in gaining insight into the agency's internal processes; (b) the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements; (c) any offsetting benefits the agency may realize in disclosing the same; (d) the privacy interests of individuals and entities that are the subject of adjudication materials; and (e) any other relevant considerations, such as other legal requirements or agency-specific adjudicatory practices.

One of the reasons the Attorney General interpreted § 552(a)(2)(A)[219] as applicable only to precedential decisions was the belief that maintaining copies of every decision in physical

[219] The FRA, as discussed in Part I.B.2, *supra*, requires that agencies disclose certain materials online ("records of general interest or use to the public that are appropriate for public disclosure"), which could include adjudication materials. Because § 552(a)(2)(A) is the only statutory provision that requires agencies to disclose specific adjudication materials online ("final opinions . . . [and] orders"), however, that provision is held out as the base online disclosure requirement for purposes of this recommendation. Agencies should, of course, heed the FRA and any other laws relevant to online disclosure when formulating and implementing their disclosure policies. For this very reason,

reading rooms would be impracticable.[220] The Internet, however, has made it easier than ever before for agencies to maintain vast libraries of data and records, though, of course, it is not costless. Together, precedential decisions, non-precedential decisions, pleadings, briefs, motions, and other adjudication materials offer a more complete picture of agency processes than one can find through resort to precedential decisions alone. Posting all adjudication records issued and filed in formal and semi-formal proceedings online would therefore further FOIA's policy in favor of eliminating secret agency law, as well as the transparency aspirations of the FRA, PRA, OMB Circular A-130, E-Government Act, and the open government and FOIA policies established by the Obama Administration.

This study has revealed that it may be possible for agencies, no matter their size or policy-making preference or practice, to disclose all first line orders, appellate opinions, and supporting adjudication materials issued and filed in formal and semi-formal proceedings. But every agency is subject to unique circumstances and constraints, and this study does not presume to suggest that all agencies are able to or should replicate, for example, FTC's disclosure practices. Therefore, when determining whether to disclose adjudication materials in excess of FOIA's requirements, agencies should take into account: (a) the interests of the public and relevant stakeholders in gaining insight into the internal processes of the agency; (b) the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements; (c) any offsetting benefits the agency may realize in disclosing the same; (d) the privacy interests of individuals and entities that are the subject of adjudication materials; and (e) any other relevant considerations, such as other legal requirements or agency-specific adjudicatory practices.

The interests of the public and relevant stakeholders in gaining insight into the internal processes of agencies should be construed broadly, and there should be a presumption in favor of disclosure. In assessing these interests, agencies should consider the degree to which disclosing adjudicatory records in excess of FOIA's requirements would promote greater transparency and public-stakeholder trust, as well as the likelihood that such disclosure would decrease the number of FOIA requests the agency would otherwise receive.

Whether to disclose discrete decisions or supporting records may involve a generally informal consideration of costs and benefits, measured in terms of time, money, or any other realizable expense or benefit. On a more global level, in evaluating the costs and benefits of maintaining comprehensive or near-comprehensive dockets of decisions and supporting materials, each agency may wish to take into account several considerations, such as current and possible future staffing needs, whether its website is managed internally or by an outside contractor, the number of records generally issued and filed in its adjudicative proceedings, and the interests of relevant stakeholders.

Agencies must of course comply with FOIA Exemption 6 and any other relevant privacy laws and regulations. Whether a record can be sufficiently redacted such that the individual or entity that is the subject of the material cannot be associated with the proceedings, while also

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Recommendation 1 advises agencies to consider "other legal requirements" in determining which adjudicatory materials to disclose.

[220] *See* Memorandum on the Public Information Section of the APA, *supra* note 39, at 15.

shedding light into the internal processes and procedures of the agency, will factor into the decision to disclose the record in redacted form or not. If this balance cannot be achieved, of course, the record must not be disclosed.

Lastly, agencies may consider any other relevant factors in determining whether to disclose adjudication materials beyond FOIA's limited ambit. Such factors may include the nature of the agency's adjudicative proceedings and any additional, relevant governing legal requirements.

Recommendation 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.

Some adjudication schemes involve the resolution of large volumes of cases that do not vary considerably in terms of their factual backgrounds or the legal analyses employed in their dispositions. In such instances, disclosing all or nearly all decisions or supporting records may potentially impose financial and other burdens on an agency while ultimately doing little to increase transparency. Recall that SSA ALJs collectively issue hundreds of thousands of decisions annually, the vast majority of which resolve claims for disability benefits. It is likely that a high degree of factual and legal similarities exist among many of these cases, such that insight into SSA's disability laws and procedures would not be furthered by a policy of maximal or near-maximal disclosure, but would instead merely impose additional expenses and other costs on the agency. In such narrowly focused, mass adjudicative contexts, agencies should consider disclosing online only those decisions and supporting adjudication materials that represent the various types of factual scenarios and legal examinations associated with cases it adjudicates.

Recommendation 3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should consider grouping such records together within individual docket pages.

The websites surveyed that posted all or nearly all adjudication decisions and supporting adjudication materials allowed users to view such materials together in individual docket pages. The basic scheme did not appear to vary much across the different websites. Clicking on a hyperlinked name of a case would direct the user to a page containing PDF copies of all or all relevant orders, opinions, briefs, motions, pleadings, and other materials filed or issued in a case.[221] Additional inclusions, such as service notations or other procedural or case-specific information, helped provide a fuller picture of the case. By allowing users to easily view the materials filed within each case, agencies enhance the value of disclosing adjudication materials from the standpoint of transparency.

[221] *See, e.g.*, Figures 4, 5, and 6, *supra*.

Recommendation 4. Agencies should endeavor to ensure that visitors to their websites are able to easily locate adjudication materials by displaying links to agency adjudication sections in easily accessible locations on the website's homepage, as well as by maintaining a search engine and a site map or index, or both, on or locatable from the homepage.

The survey demonstrated that adjudication materials were easiest to access on websites that displayed visible, descriptively-titled links to adjudication sections. Titles such as "Decisions," "Documents and Proceedings," "Enforcement," and "Case Information" specifically allude to adjudication, notifying the user that adjudication materials may be but a click away. The location of such a link is of course constrained by the four corners of the website's homepage. Most agencies display links to adjudication sections on the banner, although agencies like BVA and CRB display them on the side.[222] No matter where they are maintained, agencies should ensure that their primary gateways to adjudication materials are easy to locate.

Additionally, search engines were found to be useful tools for locating adjudicatory materials generally, as well as for locating specific materials provided that a user entered search terms particular to an identifiable record. In this way, search engines are a helpful resource for basic as well as more advanced website visitors.

The study also revealed that site maps and indexes were helpful in locating websites' adjudication sections. Site maps, accessible from links on the homepage or located at the bottom of the homepage, were more common with the websites surveyed. Indexes, although less common, were equally effective in providing an easy pathway to adjudication materials. Whether an index was organized by topic or alphabetically made no discernible difference as far as locating adjudication materials was concerned. Therefore, agencies should consider maintaining one or both of these tools on or locatable from their website's homepage.

Recommendation 5. Agencies should endeavor to simplify the user's search for adjudication materials by offering relevant filtering and advanced search options in conjunction with their websites' main search engines that allow users to identify with greater detail the records or types of records for which they are looking.

In order to simplify users' searches for adjudicatory materials and to give advanced users more options for narrowing and refining their searches, website search engines should offer filtering and other advanced search options relevant to adjudication. General advanced search options that, for example, allow users to search by specific words or phrases or by date, are useful, and are likely offered by most agencies' search engines. Adjudication-specific options, however, allow for more efficient and productive searches. Agencies should therefore offer adjudication-specific filtering and other advanced search options in order ease users' access to adjudication materials.

The kinds of adjudication-specific options offered would necessarily be dictated by the agency's programmatic and adjudicatory idiosyncrasies, the level of emphasis the agency places on adjudication to create law and policy, and the size of the agency's adjudication output. NLRB,

[222] *See Copyright Royalty Board*, LIBRARY OF CONG. (last visited Jan. 19, 2017), https://www.loc.gov/crb/.

for instance, crafts policy almost entirely through adjudication. As a relatively large agency with an extensive adjudication docket, the filtering options offered by its main search engine reflect its adjudication-centric program. Users may search specifically for "case documents," "cases" (which brings up links to docket pages), or both. Additional filters allow users to narrow by the two types of administrative cases NRLB adjudicates (unfair labor practice cases and "representation" cases), as well as by type of document (e.g., Board decisions, ALJ decisions) and status (open or closed).[223]

FMSHRC engages solely in adjudication to achieve its mission. The available adjudication-specific filtering options offered by its main search engine reflect its focused jurisdiction, as well as the fact that it does not disclose supporting adjudicatory materials. As explained above in Part IV.B, upon entering a search in the website's search engine, users encounter four filtering options. Two of these options are adjudication-specific—"Commission Decisions" and "ALJ Decisions"—allowing the user to narrow his search broadly by type of document.[224] Agencies with similar disclosure practices and singular foci should consider offering similar options.

Many agencies engage, to varying degrees, in various policymaking activities in addition to adjudication. These agencies may be unable to offer search engines with adjudication-specific options that are as complex as NLRB's or as simple as FMSHRC's. FTC's rules, advisory opinions, guidance documents, blog posts, and press releases, for instance, are repositories of important information that should not be sidelined in favor of adjudication materials. The agency acknowledges this by offering filtering options that are relevant to all of its important activities, including adjudication.[225]

Recommendation 6. Agencies should consider offering general and advanced search and filtering options within the sections of their websites that disclose adjudication materials.

The study revealed a variety of methods by which visitors are able to search for materials within agencies' adjudication sections. (Such methods are in contrast to the search engines located on websites' homepages and related features that are the subject of Recommendation 5.) Most websites allowed users to filter or sort decisions by date or name or some other similar category, and most also offered a search engine within their adjudication section. As with advanced search options offered in conjunction with a website's main search engine (see Recommendation 5), the types of search options agencies are able to offer within their specific adjudication sections are dependent on many factors unique to each agency. That said, in addition to including general search options and a search engine in their websites' adjudication sections, agencies should consider offering adjudication-specific options, too, such as those that allow users to sort, narrow, or filter by record type (e.g., orders, opinions, briefs, motions), action or case type, docket number, and the parties.

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[223] *See Search*, NAT'L LABOR RELAT. BD. (last visited Jan. 19, 2017), https://www.nlrb.gov/search/all/Search.
[224] *See Search Results*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 19, 2017), https://search.usa.gov/search?query=&submit.x=12&submit.y=17&submit=Send&affiliate=fmshrc.
[225] *See Search FTC*, FED. TRADE COMM'N (last visited Jan. 20, 2017), https://www.ftc.gov/search/site.

FMSHRC offers a helpful model, although other agencies may require more or fewer options consistent with their needs and constraints. Recall that within FMSHRC's "Review Commission Decision" page, users may use the search engine specific to that page to search within the decisional library. Additionally, more sophisticated or knowledgeable users may utilize optional filters beneath the search engine to narrow their search by type of record (order or decision), the parties, docket number, and start and end dates.[226] These simple yet effective features allow users to locate materials with specificity, an invaluable asset when one is faced with a nearly comprehensive repository of decisions going back several decades.

FTC's adjudication section offered more numerous and specific search options to match the agency's large adjudication docket. Recall that there was a search engine in FTC's "Cases and Proceedings" page specific to that page. Additionally, users were able to filter searches by "Mission" ("Competition" or "Consumer Protection"), "Type of Action" (federal or administrative), and "Enforcement Type" (e.g., administrative complaints or civil penalties). Users were further able to arrange cases by "released date" or "updated date,"[227] and an "Advanced Search" option allowed for more sophisticated filtering, such as by topic, matter number, and industry.[228]

[226] *See Review Commission Decisions*, *Decisions*, FED. MINE SAFETY & HEALTH REV. COMM'N (last visited Jan. 20, 2017), https://www.fmshrc.gov/decisions/commission.
[227] *Id.*
[228] *Cases and Proceedings: Advanced Search*, *Cases and Proceedings*, FED. TRADE COMM'N (last visited Dec. 31, 2016), https://www.ftc.gov/enforcement/cases-proceedings/advanced-search.

APPENDIX

Reprinted below is a copy of the research questions each researcher used to collect information for the survey. Note that not all of the questions were ultimately considered in the final analysis. The framework was inspired by that developed by Stuart Shapiro and Cary Coglianese in their 2007 study, First Generation E-Rulemaking: An Assessment of Regulatory Agency Websites (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-15, 2007), *available at* http://papers.ssrn.com/abstract=980247.

Research Questions

Agency:
Website address:
Researcher:
Date:

I. Is the website easy to navigate?

A. General Navigation Information: *

1. Is there a search engine on the website's home page? Does it direct the user to adjudication materials? Is it helpful?

2. Is there a help function or FAQ page on the website? Does it direct the user to adjudication materials? Is it helpful?

3. Is there a site map or index on the home page? Does it direct the user to adjudication materials? Is it helpful?

4. Are there other language options (which languages?) or disability friendly features?

B. Specific Adjudication Sections:

1. Is there a specific section(s) pertaining to agency adjudications? How does one access it? What is it called?

2. How are adjudication documents organized?

3. How does one search for documents (e.g., search engine, docket lists, etc.)?

4. What format(s) are the documents in (e.g., .pdf, .txt, .doc)?

5. Are any documents listed inaccessible?

6. Is there a specific "FOIA" or related "open government" section that contains adjudicatory materials? Is it the same as the main adjudication section(s)?

II. What types of adjudicatory materials and information are located on the website?

A. What types of orders and opinions (including consent decrees/settlements) are on the website? Be specific, and *please indicate the title of the author of the order/opinion (i.e., the Board/Commission/Administrative Law Judge/Administrative Judge, etc.).*

B. What types of supporting administrative litigation documents (e.g., pleadings, briefs, motions) are on the website? [N.B.: This does not include documents issued by an adjudicator.]

C. What other types of documents or information are there (e.g., press releases or case summaries)?

D. Are there materials and/or information pertaining to litigation in federal court, <u>including decisions</u>? What types are they?