To carry out their missions, many federal agencies are authorized and even required by statute to issue public statements. Agencies have to maintain a delicate balance when publicly disseminating information. On the one hand, active or passive communication of information by agencies to provide members of the public alerts or data concerning dangers to health, safety, or significant economic harm is essential to protecting society’s interests and must be timely to be effective. Information dissemination by agencies also advances the public interest by encouraging public participation in government, fostering innovation, and enabling consumers to make more informed decisions.

On the other hand, it has long been recognized that if not conducted under appropriate processes, agency information dissemination has the potential to cause unfair injury to persons or entities that are the subject of the disclosure. In 1973, responding to several incidents in which agency press publicity caused significant harm to private parties, the Administrative Conference issued Recommendation 73-1, “Adverse Agency Publicity.” Recommendation 73-1 defined “adverse agency publicity” as “statements made by an agency or its personnel which invite public attention to an agency’s action or policy and which may adversely affect persons identified therein.” Recognizing that adverse agency publicity is undesirable when it is

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Comment by Alan Morrison:
I would move this sentence to end of prior paragraph because it fits there better and note would come at end of paragraph, which is less of an interruption. In 1973 starts a new thought.

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Comment by Alan Morrison:
Is the bold part of the footnote a typo?
“erroneous, misleading or excessive or it serves no authorized agency purpose,” the Conference recommended that agencies adopt rules containing minimum standards and structured practices governing the issuance of publicity. Some agencies implemented Recommendation 73-1 by adopting such rules; other agencies responded to the spirit of the Recommendation by adopting less formal internal policies to address these issues; and still other agencies took no action.

When Recommendation 73-1 was issued, traditional forms of publicity, such as the press release, were one of the primary vehicles for agencies to communicate with the public. Subsequent technological developments have led to reductions in the cost and great increases in the speed of agencies’ collection, storage, and communication of information, including the predominance of Internet-based communications, expansion of the Internet, the emergence of social media, and the proliferation of searchable online databases capable of storing large amounts of information. In addition, in recent years, “open government,” “open data,” and “smart disclosure” initiatives have encouraged agencies to disclose information to the public to enhance government transparency, increase public engagement, and help consumers make smarter choices in the marketplace.

In light of these developments, the Conference commissioned a report to study modern agency practices for dissemination of information, identify new challenges, and advise how

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4 This recommendation adopts the definition of “social media” in Recommendation 2013-5, which “broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public.” Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 242 (Dec. 17, 2013).

5 Capital markets, powered by the Internet, are now able respond more quickly to information disseminated by agencies, increasing the risk that share value will be significantly affected by such information, without regard to whether the contents of an initial communication are accurate or interpreted correctly.

Recommendation 73-1 might be updated. The report found that the way in which agencies communicate with the public has evolved. The most salient agency communications are still usually accompanied by targeted agency press releases and more traditional announcements. But agencies also release vast amounts of information to the public without specifically calling attention to it. Some agencies have also established large online databases on their websites through which they passively publish information about private parties to individuals, groups, and organizations that seek out such information and data.

As a result, this recommendation, in contrast to Recommendation 73-1, addresses information dissemination by agencies more broadly, rather than focusing on “adverse agency publicity” that specifically invites public attention to agency action or policy. As used in this recommendation, the term “information dissemination” covers agency disclosure of information to the public that may affect persons identified in the disclosure, including information that is collected by agencies and released to the public through online searchable databases. Although the scope of this recommendation is broader than Recommendation 73-1, the goal remains the same: to encourage agencies to adopt policies and practices that minimize the risk of releasing information to the public that is erroneous, misleading, excessive, or serves no authorized agency purpose. This recommendation therefore builds upon and supplements the 1973 Recommendation.

Challenges of Modern Agency Information Dissemination

The report commissioned by the Conference found that modern forms of information dissemination have created new policy and management challenges for agencies. Most social challenges of modern agency information dissemination include:

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8 “Information dissemination” does not include distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act. This limitation accords with that in Circular A-130.

9 See generally Cortez Report, supra note 7.
media, for instance, are designed to disseminate information that can be accessed quickly and
shared widely, increasing the risk that at least some important facts or nuances will be lost in
the course of disseminating the information. Social media can also create logistical hurdles for
agencies, by making it more difficult to control the distribution and content of information.

The challenges described herein should be juxtaposed with the fact that information
about potential dangers can reach the public faster and with more precision and accuracy than
ever before.

Online searchable databases present unique challenges for agencies because different
agency databases are populated with different kinds of data, obtained from different sources,
and subject to different quality controls. Such databases may also serve very different
purposes. Some databases include data reported by regulated parties, whereas others include
data generated by agencies as part of their regulatory enforcement responsibilities, while yet
others include data reported by third parties. The quality and reliability of the information
collected and made publicly available by the agency may thus vary depending on the nature of
the database. Moreover, the definition of quality and reliability may also differ from agency to
agency or even database to database. This phenomenon requires the adoption of different
standards and processes to protect the various public and private interests potentially affected
by the information set forth in a particular database. In sum, a one-size-fits-all approach is not
feasible, given the variety of searchable online databases.

Agency policies governing dissemination of information from database disclosures can
be informed by congressional directives,10 by the experience of other agencies, and by guidance
issued in connection with “open government,” “open data,” and “smart disclosure” initiatives.
For instance, the Open Data Policy directive issued by the Office of Management and Budget
(OMB) directs agencies to ensure that “open data”—publicly available data structured in a way

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(CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer
products, and provides various procedural protections to regulated parties.
that enables the data to be fully discoverable and usable by end users—is “described fully so
that consumers of the data have sufficient information to understand their strengths,
weaknesses, analytical limitations, security requirements, as well as how to process them.” 11
This and the other standards in the directive are consistent with reconciling the principles of
ensuring that the public has broad access to high quality information and to content about,
while at the same time protecting private parties specifically identified in the information
limitations of the information.

For more concrete examples of procedures and best practices that may be used to
e nsure the quality of information disseminated through online databases, agencies can look to
the experience of other agencies. For instance, the Consumer Financial Protection Bureau
(CFPB) publishes a database that allows consumers to submit complaints for various financial
products. 12 The agency describes its procedures for publishing complaints in policy statements
published in the Federal Register. 13 When the CFPB receives a consumer complaint, it
authenticates the complaint to confirm a commercial relationship existed between the
consumer and the company, and forwards the complaint to the company, which can then
respond with pre-set, “structured” responses. For a complaint narrative to be published, the
consumer must give consent, and personal information must be removed from the complaint.
The agency does not publish complaints that: (1) lack critical information, (2) have been
referred to other agencies, (3) are duplicative, (4) would reveal trade secrets, (5) are
fraudulently submitted, or (6) incorrectly identify the regulated entity. The database also
explicitly informs the user that the agency does not verify all of the facts alleged in complaints.
These procedures, described in more detail in the report commissioned by the Conference, can

11 OMB Memorandum M-13-13, supra note 6.
13 See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77
provide a useful body of experience that may be helpful to other agencies that are considering
establishing policies for information dissemination from similar databases.14

More generally, the Information Quality Act (IQA) can also provide a useful framework
for ensuring that information disseminated by agencies is not erroneous, misleading, excessive,
or serves no authorized agency purpose.15 Enacted in 2001, the IQA requires OMB to issue
government-wide guidelines to ensure the quality, objectivity, utility, and integrity of
information disclosed by agencies. The OMB guidelines implementing the IQA require agencies
to issue their own guidelines to ensure the quality of information they disseminate, as well as
to “establish administrative mechanisms allowing affected persons to seek and obtain, where
appropriate, timely correction of information maintained and disseminated by the agency that
does not comply with OMB or agency guidelines.”16 Many agencies have created procedures
for requesting correction of agency-disseminated information.

The OMB guidelines, however, exempt press releases from the scope of its
requirements.17 Nevertheless, OMB has appeared to support individual agency guidelines that
narrow the exemption for press releases.18 In developing their own guidelines to implement
the IQA, agencies they have taken different approaches with respect to the press release
exemption with acknowledgement from OMB that doing so is consistent with the IQA.19 Some
agencies have narrowed that exemption to provide that the IQA applies to new substantive
information in press releases not covered by previous information dissemination subject to the
IQA; others have adopted a broad exemption for press releases. Still others have not addressed
the issue at all.10

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15 See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-
17 Id. The guidelines also exempt opinions and adjudicative processes, but those exemptions are beyond
the scope of this recommendation.
18 See Memorandum for President’s Management Council, Agency Draft Information Quality Guidelines,
from John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB (June 10, 2002).
19 See Cortez Report, supra note 7, Appendix G.
could provide a measure of predictability in an area that remains murky. These actions are consistent with the principle of allowing an agency to make determinations that fit the mission and needs of the agency.

In light of these challenges, and given the overarching goal of balancing public and private interests, the Conference recommends that agencies adopt the following policies and best practices.

RECOMMENDATION

1. **Written policies.** Agencies that routinely engage in information dissemination that identifies individuals or private parties should adopt written policies addressing the content and procedures for information dissemination.
   a. These policies should include clear internal lines of responsibility for publishing information, and safeguards to ensure accuracy, if information is presented as accurate by the agency.
   b. These policies should extend to social media and other forms of Internet-based information dissemination.

2. **Database disclosures.** Agencies that create and maintain online databases should adopt written policies governing dissemination of information through their databases. Those policies should include the following best practices:
   a. Agencies should ensure that users are informed of the source(s), context, procedures taken to ensure data quality, and any limitations on the integrity, objectivity, accuracy or reliability of the information contained in the database, including whether the information has been verified or authenticated by the agency.
   b. Agencies should ensure that subjects identified in the database are given the
opportunity to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.

3. **Publication of policies.** Agencies should publish online their information dissemination policies.

4. **Employee training.** Agencies should provide their employees with training on their information dissemination policies.

5. **Advanced notice.** Where practicable, consistent with the nature of the information to be disseminated, and reasonable under the circumstances, agencies should give advance notice to subjects identified in the agencies’ dissemination of information.

6. **Publicizing investigations and other preliminary actions.** Agencies should not publicize preliminary investigations directed at a member of the public or a regulated entity as to which the agency has not reached a formal internal conclusion, except where required by statute or in circumstances supported by the public interest.

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Comment by Alan Morrison:

I do not understand what the bold phrase means (also lines 161-162). Does it mean that the agency does not have to provide the opportunity, or is it directed at what the agency must do in response? I should think that there is no reason NOT to let the public object, but that does not say what the agency is required to do in response.

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What does this mean? Is there a definition?

Commented [GDB8]:

What does this mean? Is there a definition? By definition a preliminary investigation means that the agency has reached some conclusion that requires them to act.

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What does this mean? Is there a definition?

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What does this mean?

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This recommendation (#6) either needs a substantial rewrite or should be deleted. Here are three recent examples where investigations have been disclosed. This recommendation would give the impression that ACUS is suggesting such information should not be disclosed to the public excepted if “supported by the public interest” which isn’t defined.

EXAMPLE 1: IBM disclosed through its public filing at SEC that the company is under investigation for accounting practices in US, Britain, and Ireland. The SEC data is regularly disclosed to the public. Does the SEC need to excise the information from its database? Or is this supported by the public interest?

EXAMPLE 2: FDA released two reports about its investigation of Theranos, a blood-testing company. Does this recommendation suggest FDA should not do that? Or is this another example of supported by the public interest? Theranos claims it has addressed the deficiencies identified by FDA. That would suggest that Theranos does not agree that disclosure is supported by the public interest. Does that mean FDA shouldn’t disclose the investigations?

EXAMPLE 3: EPA’s Enforcement and Compliance History Online (ECHO), a searchable, publicly accessible database about corporate violations, provides data on “informal enforcement actions.” Are these considered “preliminary investigations”? They aren’t “formal” conclusions. (More about this in the Echo data dictionary at http://echo.epa.gov/help/reports/dft-data-dictionary. Exactly the type of metadata that ACUS should be applauding.) Here’s a sample record: http://echo.epa.gov/detailed-facility-report?id=110059763536
7. Publicly disclosing legal complaints and agency adjudicatory proceedings. If agencies publicize legal complaints or the commencement of an adjudicatory proceeding, **when practicable**, they should do so only with a clear explanation that the allegations have not been adjudicated and may be disputed.

8. Clarifying the Information Quality Act as to Press Releases. OMB should consider clarifying whether the Information Quality Act applies to new, substantive information in press releases that has not been previously disseminated by the agency.

9. Objections, corrections, and retractions. Agencies that engage in information dissemination not subject to the Information Quality Act should adopt procedures for accepting and responding to objections to information disseminated by the agency, and for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest. Agencies should furnish the public with a designated point of contact within the agency for submission of objections.