Federal agencies participate in thousands of court cases every year. Most such cases result in “agency litigation materials,” which this recommendation defines as including agencies’ publicly filed pleadings, briefs, and consent decrees, as well as court decisions bearing on agencies’ regulatory or enforcement activities. The definition does not include court filings by private parties.

Public access to agency litigation materials is desirable for at least two reasons. First, because agency litigation materials often clarify how the federal government interprets and aims to enforce federal law, they can help people understand their legal obligations. Second, public access to agency litigation materials promotes accountable and transparent government. Those two reasons distinguish agency litigation materials from litigation filings by private parties.

However valuable public access to agency litigation materials might be, federal law does little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of Information Act (FOIA) requires disclosure, and then only when members of the public specify the materials in which they are interested. In the same vein, the E-Government Act of 2002 requires federal courts to make their written opinions, including opinions in cases involving federal agencies, available on websites. But that requirement has not always made judicial opinions readily accessible to the public, partly because most courts’ websites lack functions and features that would allow users to easily identify cases about specific topics or agencies. The most comprehensive sources of agency litigation materials are the Public Access to Court

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Electronic Records (PACER) service and paid legal research services like Westlaw and Lexis. Yet the cost, requirement to provide billing information, and limitations on search functionality might keep some people from using them to find agency litigation materials.

Agency litigation webpages are a convenient way for the public to examine agency litigation materials. For purposes of this Recommendation, an agency litigation webpage is a webpage on an agency’s website that systematically catalogs and links to agency litigation materials. The documents linked on an agency litigation webpage can include pleadings, briefs, court opinions, and consent decrees. When agencies maintain up-to-date, search-friendly litigation webpages, the public can visit them and quickly find important filings in court cases concerning matters of interest. Agency litigation webpages thus make it easier for the public to learn about the law and to hold government accountable for agencies’ actions.

Several federal agencies already maintain agency litigation webpages. A survey of websites for 25 federal agencies of all stripes revealed a range of practices when it comes to agency litigation webpages. The survey suggests that most federal agencies do not maintain active agency litigation webpages. Among those that do, the quality of the litigation webpages varies appreciably. Some contain vast troves of agency litigation materials; others contain much more limited collections. Some are updated regularly; others are updated only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages, save that all the surveyed litigation webpages contained only the publicly filed versions of litigation materials, with all confidential material—such as trade secrets and personal identifying information—redacted.

Commented [MAB2]: Vast troves sounds almost pejorative, as if they dump everything there so no one can find anything.
An inspection of agencies’ litigation webpages suggests three general features that make a litigation webpage useful. First, an agency’s litigation webpage must be easy to find. Second, it must contain a robust collection of agency litigation materials. Third, those materials must be easy to search and sort.

The Conference recognizes that creating and maintaining a useful litigation webpage takes time, money, and effort. The Conference also recognizes that an agency’s decision to launch a litigation webpage will necessarily be informed by considerations like the agency’s mission, litigation portfolio, existing technological capacity, budget, and the anticipated benefits—public-facing and internal—of creating a litigation webpage. Similarly, decisions about what content to include on a litigation webpage should be tailored to each agency’s unique circumstances.

Since the decision to create and maintain a litigation webpage involves a balance of factors that will differ from agency to agency, this Recommendation should not be read to suggest that every agency should create and maintain a litigation webpage or to dictate the precise contents or structure of that webpage. It simply offers best practices and factors for agencies to consider in making their litigation materials available on agency litigation webpages.

RECOMMENDATION

Providing Access to Agency Litigation Materials

1. Agencies should consider providing access on their websites to agency litigation materials, including agencies’ publicly filed pleadings, briefs, and consent decrees, as well as court decisions bearing on agencies’ regulatory or enforcement activities.

2. In determining whether to provide access to agency litigation materials on their websites, and in determining which types of agency litigation materials to include on their websites, agencies should consider the following factors:
   a. The costs of creating and maintaining a webpage providing access to the types of agency litigation materials the agency sees fit to include;

Commented [MAB3]: Unique seemed redundant.

Commented [MAB4]: I would put costs last not first so as not to discourage agencies from doing this. I suggest we discuss best order.
b. The internal benefits of maintaining a webpage providing access to certain types of agency litigation materials;

c. The public’s interest in having ready access to certain categories of the agency’s litigation materials;

d. The extent to which providing access to agency litigation materials on the agency’s website will advance the agency’s mission;

e. The nature of the agency’s litigation portfolio, including the quantity of litigation materials the agency generates each year; and

f. The degree to which the agency’s existing technological capacity can accommodate the creation and maintenance of a webpage providing access to certain types of agency litigation materials.

3. In determining which agency litigation materials to include on their websites, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy and business interests implicated by the disclosure of litigation materials. Each agency should implement a protocol to ensure that, before a document is posted to the agency’s litigation webpage, the document has been reviewed and determined not to contain confidential information, such as trade secrets and personal identifying information.

4. Agencies that choose to post significant quantities of litigation materials on their websites should consider grouping together links to those materials on a single, dedicated webpage—what this recommendation refers to as an agency litigation webpage. If an agency is organized so that its component units have their own litigation portfolios, it may make sense for some or all of the component units to have their own litigation webpages, rather than having or for the agency’s to maintain a litigation webpage cover all compiling litigation materials from or relating to the agency’s component units.

Commented [MAB5]: If there are such benefits (such as helping agency personnel know what the agency is saying or enabling lawyers to locate relevant pleadings more easily), they should be explained briefly in the preamble. Related to this, will it be of use to other agencies?

Commented [MAB6]: Is this necessary? All of these papers have been filed in court, redacted if necessary, hence they are all public documents. I suggest saying something along those lines in the preamble and do not urge agencies to do any more work and hence be less likely to follow this recommendation.

Commented [MAB7]: Seems unnecessary.

Commented [MAB8]: No footnotes in recommendation. The issue of sub-units within an agency should be addressed in text in the preamble and the recommendation be shortened as suggested.

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5 The term “component units” encompasses an agency’s sub-units, which are often identified under terms like “agency,” “bureau,” “administration,” “division,” or “service.” For example, the United States Fish and Wildlife Service is a component unit of the Department of the Interior, and the Office of Water is a component unit of the United States Environmental Protection Agency.
Making It Easy to Locate Agency Litigation Webpages

5. Agencies should make sure that website users can locate their agency’s litigation materials easily on their agency’s websites. Agencies can accomplish this goal by:
   a. Displaying links to agency litigation webpages in readily visible locations on the homepage for the agency’s website; and/or
   b. Maintaining a search engine and a site map or index, or both, on the agency’s homepage.

6. When an agency collects its component units’ litigation materials on a single litigation webpage, those component units should consider posting links, on their websites, to the agency’s litigation webpage—rather than maintaining their own litigation webpages.

Making It Easy to Find Relevant Materials on Agency Litigation Webpages

7. Agency litigation webpages should group together materials from the same and related cases. They might, for example, provide a separate docket page for each case, with a link to the docket page on their litigation webpages. Agencies should consider linking to the grouped-together materials when issuing press releases concerning that litigation.

8. Agencies should consider offering general and advanced search and filtering options within their litigation webpages. The search and filtering options could, for instance, allow users to sort, narrow, or filter searches according to criteria like action or case type, date, topic, case number, party name, a relevant statute or regulation, or specific words and phrases, along with any other criteria the agency decides are especially useful given its litigation activities.