



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Draft Proposed Recommendation for Committee | July 28, 2020

1 Federal agencies participate in thousands of court cases every year. Some agencies have
2 thousands of cases with unrepresented litigants. While some of these~~Most such~~ cases result in
3 “agency litigation materials,” some relate to cases that have unique circumstances and facts that
4 may not have broad application to others,~~which this~~ This recommendation is focused on agency
5 litigation materials that would have broad application and would have bearing on the ~~defines as~~
6 ~~including agencies’ publicly filed pleadings, briefs, and consent decrees, as well as court~~
7 ~~decisions bearing on~~ agencies’ regulatory or enforcement activities. The definition does not
8 include court filings by private parties.

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

15 However valuable public access to agency litigation materials might be, federal law does
16 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of
17 Information Act (FOIA) requires disclosure, and then only when members of the public specify
18 the materials in which they are interested.¹ In the same vein, the E-Government Act of 2002
19 requires federal courts to make their written opinions, including opinions in cases involving

¹ See 5 U.S.C. § 552(a)(3).



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20 federal agencies, available on websites.² But that requirement has not always made judicial
21 opinions readily accessible to the public, partly because most courts' websites lack functions and
22 features that would allow users to easily identify cases about specific topics or agencies. The
23 most comprehensive sources of agency litigation materials are the Public Access to Court
24 Electronic Records (PACER) service and paid legal research services like Westlaw and Lexis.
25 Yet the cost, requirement to provide billing information, and limitations on search functionality
26 might keep people from using them to find agency litigation materials.

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

35 Several federal agencies already maintain agency litigation webpages.³ A survey of
36 websites for 25 federal agencies of all stripes revealed a range of practices when it comes to
37 agency litigation webpages.⁴ The survey suggests that most federal agencies do not maintain
38 active agency litigation webpages. Among those that do, the quality of the litigation webpages
39 varies appreciably. Some contain vast troves of agency litigation materials; others contain much
40 more limited collections. Some are updated regularly; others are updated only sporadically.
41 Some are easy to locate and search; others are not. In short, there appears to be no standard

² See 44 U.S.C. § 3502(a).

³ See Mark Thomson, Draft Report on Agency Litigation Webpages at 15–16 (June 30, 2020) (draft report to the Admin. Conf. of the U.S.) (forthcoming).

⁴ See *id.* at 14–20 (identifying variations in agency practices). The survey conducted for this Recommendation covered agencies of all stripes—big and small, independent and not, regulatory and benefit-oriented, and so forth—with the aim of covering a broad and at least somewhat representative cross-section of federal agencies. In particular, the survey focused on agencies that are frequently in federal court or that are parties to a significant number of high-profile cases.



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42 practice for publishing and maintaining agency litigation webpages, save that all the surveyed
43 litigation webpages contained only the publicly filed versions of litigation materials, with all
44 confidential material—such as trade secrets and personal identifying information—redacted.

45 An inspection of agencies' litigation webpages suggests three general features that make
46 a litigation webpage useful. First, an agency's litigation webpage must be easy to find. Second, it
47 must contain a robust collection of agency litigation materials. Third, those materials must be
48 easy to search and sort.

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

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

RECOMMENDATION

Providing Access to Agency Litigation Materials

- 63
- 64 1. Agencies should consider providing access on their websites to agency litigation
65 materials, including agencies' publicly filed pleadings, briefs, and consent decrees, as
66 well as court decisions bearing on agencies' regulatory or enforcement activities.



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- 67 2. In determining whether to provide access to agency litigation materials on their websites,
68 and in determining which types of agency litigation materials to include on their
69 websites, agencies should consider the following factors:
- 70 a. The costs of creating and maintaining a webpage providing access to the types of
71 agency litigation materials the agency sees fit to include;
 - 72 b. The internal benefits of maintaining a webpage providing access to certain types
73 of agency litigation materials;
 - 74 c. The public’s interest and utility in having ready access to certain categories of the
75 agency’s litigation materials;
 - 76 d. The extent to which providing access to agency litigation materials on the
77 agency’s website will advance the agency’s mission;
 - 78 e. The nature of the agency’s litigation portfolio, including the quantity of litigation
79 materials the agency generates each year; ~~and~~
 - 80 f. The degree to which the agency’s existing technological capacity can
81 accommodate the creation and maintenance of a webpage providing access to
82 certain types of agency litigation materials;
 - 83 g. The risk of disclosure or wide dissemination of confidential or sensitive
84 information of private litigants;
 - 85 h. The availability of the information on other public websites;
 - 86 i. The significance of the litigation to the agencies’ mission and purpose;
 - 87 j. The confusion that the materials may cause the public when the area is evolving
88 rapidly; and
 - 89 ~~f.k.~~ The publication of the agencies’ litigation material without the private litigants’
90 positions may give the public an unbalanced perspective.-
- 91 3. In determining which agency litigation materials to include on their websites, agencies
92 should ensure that they have implemented appropriate safeguards to protect relevant
93 privacy and business interests implicated by the disclosure of litigation materials. Each
94 agency should implement a protocol to ensure that, before a document is posted to the
95 agency’s litigation webpage, the document has been reviewed and determined not to

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96 contain confidential information, such as trade secrets and personal identifying
97 information. The agency should refrain from publishing materials where private litigants
98 object to their information being disclosed.

- 99 4. Agencies that choose to post significant quantities of litigation materials on their websites
100 should consider grouping together links to those materials on a single, dedicated
101 webpage—what this recommendation refers to as an agency litigation webpage. If an
102 agency is organized so that its component units⁵ have their own litigation portfolios, it
103 may make sense for some or all of the component units to have their own litigation
104 webpages, or for the agency to maintain a litigation webpage compiling litigation
105 materials from or relating to the agency’s component units.

106 **Making It Easy to Locate Agency Litigation Webpages**

- 107 5. Agencies should make sure that website users can locate the agencies’ litigation materials
108 easily on the agencies’ websites. Agencies might accomplish this goal by
- 109 a. Displaying links to agency litigation webpages in readily visible locations on the
110 homepage for the agency’s website; and
 - 111 b. Maintaining a search engine and a site map or index, or both, on the agency’s
112 homepage.
- 113 6. When an agency collects its component units’ litigation materials on a single litigation
114 webpage, those component units should consider posting links, on their websites, to the
115 agency’s litigation webpage rather than maintaining their own litigation webpages.

116 **Making It Easy to Find Relevant Materials on Agency Litigation Webpages**

- 117 7. Agencies and their components should have maximum flexibility in organizing materials.
118 Agency litigation webpages should consider grouping together materials from the same
119 cases. They might, for example, consider providing a separate docket page for each

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.



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120 case, with a link to the docket page on their litigation webpages. Agencies should
121 consider linking to the grouped-together materials when issuing press releases concerning
122 that litigation.

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