



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Draft Proposed Recommendation for Committee | October 30, 2020

1 Federal agencies and their component units¹ participate in thousands of court cases every
2 year. Most such cases result in “agency litigation materials,” which this recommendation defines
3 as including agencies’ publicly filed pleadings, briefs, and settlements, as well as court decisions
4 bearing on agencies’ regulatory or enforcement activities. The definition does not include court
5 filings by private parties.

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

11 However valuable public access to agency litigation materials might be, federal law does
12 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of
13 Information Act (FOIA) requires disclosure, and then only when members of the public specify
14 the materials in which they are interested.² In the same vein, the E-Government Act of 2002
15 requires federal courts to make their written opinions, including opinions in cases involving
16 federal agencies, available on websites.³ But that requirement has not always made judicial

¹ 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.

² See 5 U.S.C. § 552(a)(3).

³ See 44 U.S.C. § 3502(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

17 opinions readily accessible to the public, partly because most courts’ websites lack functions and
18 features that would allow users to easily identify cases about specific topics or agencies.

19 The most comprehensive source of agency litigation materials is the federal courts’
20 Public Access to Court Electronic Records (PACER) service, which provides the public with
21 access to most documents filed in federal court. But users must pay a fee for every search they
22 conduct on PACER and every document they view. Those costs can add up, especially when
23 users are uncertain about what cases or documents they are trying to find. PACER’s limited
24 search functionality also makes it difficult to find cases involving particular agencies, statutes,
25 regulations, or types of agency action. For example, a person interested in identifying ongoing
26 cases to which the United States Fish and Wildlife Service (FWS) is a party would have to
27 search for a host of terms—including “United States Fish and Wildlife Service,” “U.S. Fish and
28 Wildlife Service,” and the names of FWS’s recent directors—just to come close to identifying all
29 such cases. Even after conducting all those searches, moreover, the person would still have to
30 scroll through and eliminate search results involving state fish-and-wildlife agencies and private
31 citizens with the same names as FWS’s recent directors. Similarly, were a person interested in
32 finding cases about FWS’s listing of species under the Endangered Species Act (ESA), PACER
33 would not afford that person any way to filter search results to include only cases about ESA
34 listings. The person’s only option would be to open and review documents in potentially
35 thousands of cases.

36 The cost and time required to perform this type of research on PACER limit PACER’s
37 usefulness as a tool for locating and searching agency litigation materials.⁴ And while other legal
38 research services, such as Westlaw and Lexis, have more advanced search capabilities than
39 PACER, they cost so much that, as a practical matter, most members of the public are unlikely to
40 use them to find agency litigation materials.

Commented [MT1]: DOJ proposes replacing this language with language along the lines of the following:

While PACER has reduced or eliminated costs for many users, its functionality is currently limited.

Commented [MT2]: DOJ proposes deleting what’s currently the last sentence in this footnote.

⁴ PACER can certainly be improved in ways that might make it a more broadly suitable means for identifying and obtaining agency litigation materials. Legislation pending in Congress at the time of this Recommendation is at least one step in that direction. See Electronic Court Records Reform Act of 2019, H.R. 1164, 116th Cong. (2019). But even the improvements proposed in that legislation would not render PACER an adequate substitute for agency litigation webpages, for all the reasons identified above.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

41 Agency litigation webpages, by contrast, can be a convenient way for the public to
42 examine agency litigation materials. For purposes of this Recommendation, an agency litigation
43 webpage is a webpage on an agency’s website that systematically catalogs and links to agency
44 litigation materials that may aid the public in understanding the agency’s regulatory or
45 enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation
46 webpages, the public can visit them and quickly find important filings in court cases concerning
47 matters of interest. Agency litigation webpages thus make it easier for the public to learn about
48 the law and to hold government accountable for agencies’ actions.

49 Several federal agencies already maintain agency litigation webpages.⁵ A survey of
50 websites for 25 federal agencies of all stripes revealed a range of practices regarding agency
51 litigation webpages.⁶ The survey suggests that most federal agencies do not maintain active
52 agency litigation webpages. Among those that do, the quality of the agency litigation webpages
53 varies appreciably. Some contain vast troves of agency litigation materials; others contain much
54 more limited collections. Some are updated regularly; others are updated only sporadically.
55 Some are easy to locate and search; others are not. In short, there appears to be no standard
56 practice for publishing and maintaining agency litigation webpages, save that all the surveyed
57 agency litigation webpages contained only the publicly filed versions of agency litigation
58 materials, with all confidential material—such as trade secrets and personal identifying
59 information—redacted.

60 An inspection of agencies’ litigation webpages suggests four general features that make
61 an agency litigation webpage useful. First, an agency’s litigation webpage must be easy to find.
62 Second, it must contain a representative and up-to-date collection of agency litigation materials.
63 Third, those materials must be easy to search and sort. And fourth, the agency’s litigation

⁵ 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).

⁶ 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.

Commented [MT3]: DOJ proposes amending the recommendation to include something like the following language, whether at the end of this paragraph or as a recommendation:

To accomplish these goals and to avoid misleading the public, agencies should consider posting opposing counsel’s pleadings and court opinions so that the public sees both sides of an argument and how the dispute is resolved. Along these lines, agencies should not present litigation materials as a means of setting policy, nor should public access to their litigation materials be used to circumvent an agency’s formal rulemaking process. Administrators should be given objective guidance for postings, regardless of whether the agency has prevailed in the case. Agencies also need to be wary of posting descriptions of litigation (outside the pleadings) that do not fairly reflect the case.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

64 webpage must give visitors the information they need to understand the materials on the
65 webpage, including information about materials the agency omitted from the webpage and the
66 criteria the agency employed to determine which materials to include on the webpage.

67 Agency litigation webpages can promote transparency and accountability. The
68 Conference recognizes, however, that creating and maintaining a useful agency litigation
69 webpage takes time, money, and effort. An agency's decision to launch an agency litigation
70 webpage should, therefore, be informed by considerations like the agency's mission, litigation
71 portfolio, existing technological capacity, budget, and the anticipated benefits—public-facing
72 and internal—of creating an agency litigation webpage, and an agency's decisions about what
73 content to include on an agency litigation webpage should be tailored to the agency's unique
74 circumstances. An agency that litigates thousands of cases each year, for example, might
75 justifiably choose to feature only a representative sample of agency litigation materials on its
76 agency litigation webpage. An agency that litigates many repetitive, fact-based cases could
77 reasonably opt to post documents from just a few example cases instead of posting documents
78 from all of its cases.⁷ And an agency that litigates many different types of cases, some of
79 obviously greater interest to the public than others, might appropriately restrict the contents of its
80 agency litigation webpage to agency litigation materials from the types of cases that are of
81 greater public interest, particularly when the agency determines that the resources required to
82 post more agency litigation materials can be better applied elsewhere.

83 Since the decision to create and maintain an agency litigation webpage involves
84 balancing factors that will differ from agency to agency, this Recommendation should not be
85 read to suggest that every agency create and maintain an agency litigation webpage. Nor should
86 this Recommendation be read as dictating the precise contents or structure of agency litigation
87 webpages. While encouraging the creation and maintenance of agency litigation webpages, the
88 Conference recognizes that an agency's unique circumstances might ultimately militate against

⁷ Cf. Administrative Conference of the United States, Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017) (“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 on their websites a representative sampling of actual cases and associated adjudication materials.”).

Commented [MT4]: DOJ proposes amending the preamble to include the following language at this point in the sentence:

not to create an agency litigation webpage at all or choose

Commented [MT5]: DOJ suggests adding language to the recommendation noting that there may be circumstances in which it would be beneficial for the agency to include filings by private parties as a means of putting certain agency litigation materials in context. This may be a good spot to add such language.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

89 creating an agency litigation webpage, or might support only the creation of a comparatively
90 limited agency litigation webpage. At bottom, this Recommendation simply offers best practices
91 and factors for agencies to consider in making their agency litigation materials available on their
92 websites, should the agencies choose to do so. The Recommendation leaves the weighing and
93 balancing of those factors to the sound discretion of individual agencies.

RECOMMENDATION

Providing Access to Agency Litigation Materials

- 96 1. Agencies should consider providing access on their websites to publicly filed agency
97 litigation materials, as well as court decisions, bearing on agencies' regulatory or
98 enforcement activities. Agency litigation materials include agencies' publicly filed
99 pleadings, briefs, and settlements.
- 100 2. Should an agency choose to post such material, an agency with a large volume of court
101 litigation could decide not to post documents from every case. The agency might, for
102 instance, post examples of filings from routine litigation and all or a portion of the filings
103 from cases raising important or unusual questions.
- 104 3. In determining whether to provide access to agency litigation materials on their websites,
105 and in determining which types of agency litigation materials to include on their
106 websites, among the factors agencies should consider are the following:
 - 107 a. The internal benefits of maintaining a webpage providing access to certain types
108 of agency litigation materials;
 - 109 b. The public's interest in freely accessing certain categories of the agency's
110 litigation materials;
 - 111 c. The extent to which providing access to agency litigation materials on the
112 agency's website will advance the agency's mission;
 - 113 d. The costs of creating and maintaining a webpage providing access to the types of
114 agency litigation materials the agency sees fit to include;
 - 115 e. The nature of the agency's litigation portfolio, including the quantity of litigation
116 materials the agency generates each year;

Commented [MT6]: DOJ proposes adding the following factor between the factors currently listed as (b) and (c):

The availability of other technology that may more reliably and effectively give access to this material because of its scale or volume and the wide variety of issues and matters involved;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 117 f. The degree to which the agency’s existing technological capacity can
118 accommodate the creation and maintenance of a webpage providing access to
119 certain types of agency litigation materials;
- 120 g. The risk of disclosure or wide dissemination of confidential or sensitive
121 information of private litigants; and
- 122 h. The risk that publication of the agencies’ litigation materials without private
123 litigants’ positions may give the public an unbalanced perspective.
- 124 4. In determining which agency litigation materials to include on their websites, agencies
125 should ensure that they have implemented appropriate safeguards to protect relevant
126 privacy and business interests implicated by the disclosure of agency litigation materials.
127 Each agency should implement a protocol to ensure that, before a document is posted to
128 the agency’s litigation webpage, the document has been reviewed and determined not to
129 contain confidential information, such as trade secrets and personal identifying
130 information.
- 131 5. Agencies should disclose materials in a way that gives a full and accurate picture of their
132 litigating positions. To avoid the appearance of selective or misleading disclosure of
133 agency litigation materials achieve that goal, agencies should consider:
- 134 a. Pre-committing to the use of clear, publicly available criteria to determine which
135 agency litigation materials the agencies will publish on their websites;
- 136 b. Periodically reviewing their websites to make sure the agency litigation materials
137 there are complete and up-to-date; and
- 138 c. Providing appropriate context for agency litigation materials, at least where
139 failure to do so might confuse or mislead the public.
- 140 6. Agencies that choose to post significant quantities of agency litigation materials on their
141 websites should consider grouping together links to those materials on a single, dedicated
142 webpage. If an agency is organized so that its component units have their own litigation
143 portfolios, it may make sense for some or all of the component units to have their own
144 agency litigation webpages, or for the agency to maintain an agency litigation webpage
145 compiling litigation materials from or relating to the agency’s component units.

Commented [MT7]: Note for committee:

This presumes that agencies are not going to publish private litigants’ litigation materials, which may not always be the case.

Commented [MT8]: DOJ proposes replacing this recommendation with the following two recommendations:

1. Agencies should use and publicly post objective criteria about how their litigation website is curated. The webpage should explain the types of litigation in which the agency is involved and other ways to search for agency litigation materials. It should also include a disclaimer explaining the adversarial process of our legal system and disclose the existence of the other side’s pleadings, the court’s ruling, and whether or not the ruling is being appealed. Additionally, this disclaimer should explain that litigation materials are not agency rules.

2. Agencies that choose to create agency litigation webpages should regularly review those sites to ensure the materials are complete and up-to-date, and provide appropriate context for posted materials where there is a risk of otherwise confusing or misleading the public.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

- 147 7. Agencies that post agency litigation materials on their websites should make sure that
148 website users can easily locate those materials. Agencies can accomplish this goal by
149 a. Displaying links to agency litigation webpages in readily visible locations on the
150 homepage for the agency's website; and
151 b. Maintaining a search engine and a site map or index, or both, on the agency's
152 homepage.
- 153 8. When an agency collects its component units' litigation materials on a single agency
154 litigation webpage, those component units should post links, on their websites, to the
155 agency's litigation webpage.

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

- 157 9. Agencies and their component units should have substantial flexibility in organizing
158 materials. Agency litigation webpages should consider grouping together materials from
159 the same and related cases. They might, for example, consider providing a separate
160 docket page for each case, with a link to the docket page on their agency litigation
161 webpages. Agencies should consider linking to the grouped-together materials when
162 issuing press releases concerning that litigation.
- 163 10. Agencies should consider offering general and advanced search and filtering options
164 within their agency litigation webpages. The search and filtering options could, for
165 instance, allow users to sort, narrow, or filter searches according to criteria like action or
166 case type, date, topic, case number, party name, a relevant statute or regulation, or
167 specific words and phrases, along with any other criteria the agency decides are
168 especially useful given its litigation activities.