Agency Publicity in the Internet Era

Committee on Administration and Management

Proposed Recommendation | October 21, 2015

In 1973, the Administrative Conference issued Recommendation 73-1, “Adverse Agency Publicity,” recommending that agencies adopt rules containing minimum standards and structured practices governing the issuance of publicity that may adversely affect identified persons. At the time, traditional forms of publicity, such as the press release, were the primary vehicle 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’ collecting, storing and communicating 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. These technical advances have created new avenues for agencies to publicly disseminate information about private parties, as well as new challenges for agencies in managing the distribution of information to the public.

In this recommendation, the Conference builds upon and supplements the 1973 Recommendation and urges agencies to adopt policies and best practices that adequately balance public and private interests in the rapidly changing landscape of modern information disclosure.

Modern Agency Publicity

Many agencies are authorized and even required by statute to issue public statements about their activities. There are two potential types of costs from agency publicity — not providing the information fast enough and providing the information too quickly. On the

Commented [A01]: I would like to make explicit that there are costs to waiting and costs to moving quickly. The draft (and consultant’s report) seem focused on the second type of error.

former, aAgency use of these statements to inform or warn members of the public of dangers
to health, safety, or significant economic harm is essential to protecting society’s interests.
Agency publicity can also advance the public interest by enabling consumers to make more
informed decisions.

But, on the latter, agency publicity also has the potential to cause serious and
sometimes unfair injury, particularly when it identifies and singles out specific persons or
entities for criticism. 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.” As Recommendation 73-1
recognized, adverse agency publicity “is undesirable when it is erroneous, misleading or
excessive or it serves no authorized agency purpose.”

Recommendation 73-1 responded to several well-known incidents in which adverse
agency publicity issued through press releases caused significant harm to regulated parties.
The Administrative Conference called for agencies to adopt published rules requiring publicity
to (1) be accurate and not disparaging, (2) announce investigations and other pending actions
only in carefully prescribed circumstances, (3) fulfill an authorized purpose, (4) disclose when
any information has a limited basis and give parties prior notice when practicable, and (5) be
corrected or retracted when erroneous or misleading. 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.

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2 Id. Recommendation 73-1 distinguished agency publicity “from the mere decision to make records
available to the public rather than preserve their confidentiality,” as those decisions are governed by the criteria
set forth in the Freedom of Information Act (FOIA), 5 U.S.C. § 552. To the extent that information is required to be
disclosed by FOIA, this recommendation does not suggest withholding such information.
3 Recommendation 73-1.
4 Id.; see also NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 1 (September 25, 2015) (Report to the
Administrative Conference of the United States) [hereinafter Cortez Report].
5 Recommendation 73-1; Cortez Report, at 1.
In light of subsequent developments, such as the emergence of agency web sites, social media, and searchable online databases as means for agencies to communicate with the public, the Conference commissioned a report to study modern agency publicity practices, identify new challenges, and advise how Recommendation 73-1 might be updated. The report found that the potential for adverse agency publicity to injure private parties has increased substantially with the rapid proliferation of new forms of communication, and that modern publicity has created both new policy and management challenges for agencies. Most social media, for instance, are designed to generate information that can be accessed quickly and shared widely, increasing the risk that at least some important facts or nuances will be lost when information is disseminated. Social media can also create logistical hurdles for agencies, by making it more difficult for them to exercise control over the distribution and content of communications by individual employees regarding agency actions. A further complication arises from the ability of capital markets, now powered by the Internet, to respond more quickly to agency publicity, increasing the risk for potential damage to a company’s reputation and share value, without regard to whether the contents of an initial communication are accurate or interpreted correctly.

Another recent development that has the potential to increase the impact of adverse agency publicity on private parties is the proliferation of searchable online databases. Federal agencies now maintain an unknown but large number of searchable online databases that may contain negative information about regulated parties. The use of such databases may extend back to 1986, when Congress required the Environmental Protection Agency (EPA) to establish a Toxic Release Inventory (TRI) to track chemical releases by facilities nationwide in a computer database accessible to any person. Interest in using searchable online databases for regulatory purposes has only increased with recent “open government,” “smart disclosure,”

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6 See generally Cortez Report.
7 See id. at 25.
8 See id. at 18.
9 See id. at 18-19. The TRI has been credited with having a significant impact on firm-level emissions and has inspired similar disclosure efforts internationally. See id.
and “open data” initiatives, which urge agencies to “harness new technologies to put information about their decisions online and readily available to the public.”

Online databases present special challenges because different agency databases are populated with different kinds of data, which require adoption of different standards to protect the various public and private interests potentially affected by these communications. Some databases include data reported by regulated parties, whereas others include data generated by agencies as part of their regulatory enforcement responsibilities or reported by third parties with varying degrees of quality control. The risk of publishing inaccurate adverse information about regulated parties may be greater when a database includes information produced by agencies or provided by third parties, than when information comes directly from the regulated entity. Therefore, policies and best practices governing communications should be based on the nature of the database or databases maintained by the agency, rather than general rules that purportedly apply to all such databases.

Although a one-size-fits-all approach is not feasible, given the variety of searchable online databases, an agency’s policies governing databases can be informed by the experience of other agencies, as well as by congressional directives. For example, the Consumer Financial Protection Bureau (CFPB) publishes a consumer complaint database that allows consumers to submit complaints for various financial products. The agency describes its procedures for publishing complaints in Policy Statements published in the Federal Register. When the CFPB receives a consumer complaint, it authenticates the complaint to confirm a commercial relationship between the consumer and the company, and forwards the complaint to the

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11 See id. at 20.


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 contains a disclaimer stating 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 provide a useful body of experience that may be helpful to other agencies that are considering establishment of policies for public communications from similar databases.

The Information Quality Act

The report commissioned by the Conference also found that the Information Quality Act (IQA), enacted in 2001, could go a long way toward addressing the potential risks of adverse agency disclosures. The IQA requires the Office of Management and Budget (OMB) to issue government-wide guidelines to ensure the quality, objectivity, utility, and integrity of information disseminated by agencies. It also requires the OMB to establish administrative procedures, described in more detail in the report commissioned by the Conference, for handling public comments. As noted, statutes can also provide guidance to agencies that maintain online databases. For example, the Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 (codified in various sections of 15 U.S.C.), requires the Consumer Product Safety Commission (CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer products. The statute requires the CPSC to provide clear and conspicuous notice to database users that the agency does not guarantee the accuracy, completeness, or adequacy of the contents of the database. 15 U.S.C. § 2055(b)(5). It also requires the CPSC to afford procedural protections to regulated parties, such as the opportunity to comment on reports and to request that comments be included in reports, and provides that the agency must consider objections that a report is materially inaccurate. Id.

Commented [AO2]: We say nothing about the growing role of the White House in agency publicity. Specifically, for some agencies, press releases are reviewed by the White House, and agency spokespersons are told not to answer questions without the approval of a political appointee. (And Congress recently stripped the confirmation requirement for Assistant Secs for Public Affairs.) The consultant’s report stresses the decentralization of agency publicity (or at least the growth in the number of sources of information). But there is also more centralization. Is it worth mentioning the White House's role?
mechanisms to allow affected persons to request correction of agency-disseminated information that does not meet the IQA’s substantive standards.\(^{21}\)

However, it is not clear whether the IQA applies to agency press releases. The IQA purports to apply broadly to “agency dissemination of public information, regardless of the form or format in which such information is disseminated.”\(^{22}\) But the OMB’s guidelines implementing the IQA issued in 2002 exempt press releases, opinions, and adjudicative processes from the scope of the statute.\(^{23}\) Many agencies have drafted their own guidelines to implement the IQA, but they have taken different approaches with respect to the press release exemption. 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.\(^{24}\) Still others have not addressed the issue at all.\(^{25}\) This variance in outcome has led to confusion regarding the scope of the press release exemption.

It is also not clear whether the IQA applies to searchable online databases, since the OMB’s guidelines exempt opinions and adjudicative processes. As a result, many databases may be excluded from the scope of data quality protections.\(^{26}\) Clarifying the scope of these exemptions to the IQA would provide a measure of predictability in an area that remains murky and subject to dispute; however, this issue falls outside the scope of the report commissioned by the Conference.

\(^{21}\) See id.

\(^{22}\) 44 U.S.C. § 3504(d)(1).


\(^{24}\) See Cortez Report, supra note 4, Appendix G.

\(^{25}\) Id.

\(^{26}\) Excluding agency databases from the purview of the IQA may be necessary when, for example, information is not being presented by the agency as objective and accurate (such as when a database contains information collected from third parties). Even in those circumstances procedures can be adopted to protect regulated parties. See supra (discussing procedures adopted by CFPB).
Recommendation

1. **Written policies.** Agencies that issue adverse publicity should adopt written policies addressing the content and procedures for issuing agency announcements. These policies should include clear internal lines of responsibility for publishing information and safeguards to ensure the accuracy of agency statements. These policies should also address communications regarding the activities of the agency communicated by agency employees acting in their individual capacities.

2. **Social media.** Agencies that issue adverse publicity should adopt written policies governing social media. Agencies should incorporate into their social media policies best practices and procedures that apply to traditional types of agency publicity, as well as policies to ensure proper use of agency social media accounts.

3. **Database disclosures.** Agencies should adopt written policies governing online databases that contain adverse information about identified parties. Those policies should include best practices such as:
   a. If the information is presented to the public as accurate and objective, agencies should ensure the accuracy and objectivity of such information.
   b. If the information is not presented to the public as accurate and objective—such as databases of third party complaints—agencies should clearly disclaim the accuracy of the information, including a statement as to whether the information has been verified or authenticated by the agency.
   c. Agencies should ensure that users are informed of the source(s), context, and any limitations on the information contained in the database.
d. Agencies should ensure that subjects identified in the database are given the chance to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.

4. **Publication of policies.** Agencies should publish online their written policies governing communication of adverse publicity.

5. **Employee training.** Agencies should provide training to employees on their adverse publicity policies.

6. **Advanced notice.** Unless such notice would be impracticable or inconsistent with the nature of the proceeding, agencies should give advanced notice to subjects identified in adverse publicity, but only when the subject is not already aware of an ongoing agency action, such as in cases of fraud or during a public health emergency.

7. **Publicizing investigations, complaints, and other preliminary actions.** Unless otherwise directed by statute, agencies should not publicize the pendency of investigations directed at a member of the public or regulated entity, except in rare circumstances as required by the public interest, and should publicize complaints and other preliminary actions only with a clear explanation that the action is tentative and non-final.  

8. **Clarifying the Information Quality Act as to Press Releases.** OMB should clarify that the Information Quality Act applies to new substantive information in press releases that is not covered by previous information disseminated subject to that statute.

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Commented [AO3]: For reasons I articulated at our first meeting, I do not support the principle that agencies should consider market reactions – unless the statute requires them to.

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The Conference supports the principle that when practicable, not otherwise prohibited by statute, and subject to exceptions in the public interest, agencies with the relevant expertise should consider potential capital market reactions to their announcements and try to minimize potential market shocks. See Cortez Report, supra note 4, at 89. However, implementation of this principle is complicated by great increases in the speed of communication and trading, and the internationalization of financial markets to permit transactions on a 24 hour per day basis. Consideration of the practical steps necessary for agencies to implement this recommendation in light of these technological advances falls beyond the scope of the report and this project.
9. Clarifying the Information Quality Act as to Databases. The OMB should consider updating its guidelines to account for the different types of databases published by agencies.

10. Objections, corrections, and retractions. Agencies that issue adverse agency publicity not subject to the Information Quality Act should adopt procedures for accepting and responding to objections to such publicity and for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest. Agencies should inform regulated entities to submit their objections to a designated point of contact within the agency.