Automated Legal Guidance at Federal Agencies

Committee on Administration and Management

Proposed Recommendation | June 16, 2022

1   Federal agencies increasingly automate the provision of legal guidance to the public

2   through online tools and other technologies.[1] The Internal Revenue Service, for example,

3   encourages taxpayers to seek answers to questions regarding various tax credits and deductions

4   through its online "Interactive Tax Assistant," and the United States Citizenship and Immigration

5   Services suggests that potential green card holders and citizens with questions about their

6   immigration rights communicate with its interactive chatbot, "Emma." Almost a dozen federal

7   agencies have either implemented or piloted such automated legal guidance tools in just the past

8   three years.[2]

9   Automated legal guidance tools can take several forms. The most common are chatbots

10   and virtual assistants. The simplest chatbots provide standardized responses based on keywords

11   included in a user's question. Although the terms can overlap, virtual assistants tend to be more

12   versatile than chatbots and can often perform additional tasks such as making an appointment or

13   filling out a form in response to a conversation.[3] More robust tools rely on natural language

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[1] This Recommendation defines "guidance" broadly to include interpretive rules, general statements of policy, and other materials considered to be guidance documents under other, separate definitions adopted by government agencies. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

[2] They include the Internal Revenue Service, United States Citizenship and Immigration Services, the Department of Education, the Social Security Administration, the Patent and Trademark Office, the Army, the General Services Administration, the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.

[3] *See* Joshua D. Blank & Leigh Osofsky, Automated Legal Guidance at Federal Agencies 1, 10 (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).

14 processing, or artificial intelligence to interpret natural language and generate an individualized

15 response.[4]

16   Agencies use automated legal guidance tools for a number of reasons. These reasons

17 include efficiently allocating limited staff resources, improving user experience and service

18 delivery, and enhancing the quality, consistency, speed, and predictability of guidance provided

19 to the public. Because they are always available from any location and can efficiently and

20 effectively provide answers to common questions, automated legal guidance tools have the

21 potential to revolutionize the provision of agency guidance to the public.

22   As with other forms of guidance, there also is an issue regarding the extent to which users

23 are able to rely upon automated legal guidance. Agencies generally take the position that users

24 cannot rely upon automated legal guidance, and that automated legal guidance does not bind the

25 agency. Critics argue, however, that automated legal guidance tools can oversimplify or misstate

26 the law or offer users guidance that does not apply well to their factual circumstances. Although

27 the same can be said for other explanatory materials, such as brochures and fact sheets,

28 automated legal guidance tools pose unique concerns because they can appear to be human.

29 Users may perceive the kind of instantaneous and seemingly personalized responses provided by

30 an automated legal guidance tool to be more authoritative or persuasive than a guidance

31 document.

32   The Administrative Conference has adopted several recommendations on the

33 development, use, and public availability of agency guidance documents.[5] This Recommendation

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[4] *See* Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 3.

[5] *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process,* 79 Fed. Reg. 35,992 (June 25, 2014).

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34   builds on those recommendations by identifying best practices for agencies to consider when

35   they develop, use, and manage automated legal guidance tools. The use of these tools may not be

36   suitable for all agencies and administrative programs. Moreover, even when automated legal

37   guidance tools are used, agencies should expect that they will need to provide additional

38   guidance through other channels, including live person-to-person support. This Recommendation

39   provides best practices to guide agencies when considering using automated legal guidance tools.

RECOMMENDATION

Design and Management

40   1. Agencies should explore the possible benefits of offering automated legal guidance tools,

41   including enhancing administrative efficiency and helping the public understand complex

42   laws using plain language. This is especially true for those agencies that have a high

43   volume of individual interactions with members of the public who may not be familiar

44   with legal requirements.

45   2. Agencies should also weigh the potential downsides of automated legal guidance tools,

46   including oversimplifying the law, letting guidance appear more personalized than it

47   actually is, and not adequately disclosing that users cannot rely on the guidance to bind

48   the agency.

49   3. Agencies using automated legal guidance tools should design and manage them in ways

50   that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.

51   4. Agencies should ensure that automated legal guidance tools do not displace other agency

52   mechanisms for increasing access to the underlying law.

53   5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the

54   substance embedded in automated legal guidance tools and should publish these

55   procedures on their websites. These procedures should incorporate periodic user testing

56   and other forms of evaluation by internal and external researchers to ensure accessibility

57   and effectiveness.

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58   6. The General Services Administration should regularly evaluate the relative costs and
59   benefits of using outside vendors for the introduction of automated legal guidance tools
60   and share such information with agencies.

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Accessibility

62   7. Agencies should utilize human-centered design methodologies, empirical customer
63   research, and user testing, as described and defined in Executive Order 14,058,
64   *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in*
65   *Government* (86 Fed. Reg. 71,357, Dec. 13, 2021) in designing and maintaining their
66   automated legal guidance tools.

67   8. Agencies should, consistent with applicable laws and policies, design automated legal
68   guidance tools to ensure that they meet the needs of the particular populations that are
69   intended to utilize the automated legal guidance tools.

70   9. Agencies should periodically review and reconfigure automated legal guidance tools to
71   ensure that they meet the needs of the particular populations that are intended to utilize
72   the automated legal guidance tools.

73   10. Agencies should ensure that information provided by automated legal guidance tools is
74   stated in plain language understandable by the particular populations that are intended to
75   utilize the automated legal guidance tools, consistent with the Plain Writing Act of 2010;
76   Recommendation 2017-3, *Plain Language in Regulatory Drafting* (82 Fed. Reg. 61,728,
77   Dec. 14, 2017); and other applicable laws and policies.

78   11. Agencies should design automated legal guidance tools to put users in contact with a
79   human customer service representative to whom users can address questions in the event
80   that a question is not answered by the automated legal guidance tools or if the users are
81   having difficulty using an automated legal guidance tool.

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Transparency

82   12. When the underlying law is unclear or unsettled, or when the legal guidance depends
83   upon the facts of the particular situation, agencies should be transparent about the
84   limitations of the advice the user is receiving. To the extent practicable, agencies should
85   also provide access through automated legal guidance tools to the legal materials
86   underlying the tools, including relevant statutes, rules, and judicial or adjudicative
87   decisions.

88   13. Agencies should disclose how they store and use the data obtained through automated
89   legal guidance tools.

90   14. Agencies should update the content of automated legal guidance tools to reflect legal
91   developments or correct errors in a timely manner. Agencies should also maintain an
92   electronic, publicly accessible, searchable archive that identifies and explains such
93   updates. Agencies should ensure that the date on which the tool was last updated.

94   15. When automated legal guidance tools provide programmed responses to users' questions,
95   agencies should publish the questions and responses to provide an immediate and
96   comprehensive source of information regarding the automated legal guidance tools.
97   Agencies should post this information in an appropriate location on their websites and
98   make it accessible through the automated legal guidance tool to which it pertains.

99   16. When automated legal guidance tools learn to provide different answers to users'
100   questions over time, agencies should publish information related to how the machine
101   learning process was developed and how it is maintained and updated. Agencies should
102   post this information in an appropriate location on their websites and make it accessible
103   through the automated legal guidance tool to which it pertains.

104   17. Agencies that use automated legal guidance tools should provide users an option to
105   provide feedback or report errors.

106   18. When applicable, agencies should provide disclaimers that the automated legal guidance
107   tool is not human.

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Reliance

109   19. Agencies should allow users to obtain a written record of their communication with

110   automated legal guidance tools and should include date and time stamps for the

111   information provided.

112   20. Agencies should consider whether, or under what circumstances, a person's good faith

113   reliance on guidance provided by an automated legal guidance tool should serve as a

114   defense against a penalty or other consequences for noncompliance with an applicable

115   legal requirement, and it should prominently announce that decision to users.

116   21. If an agency takes the position that it can depart from an interpretation or explanation

117   provided by an automated legal guidance tool in a subsequent investigative or

118   adjudicative proceeding, including in the application of penalties for noncompliance, it

119   should prominently announce its position to users.

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