



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Disclosure of Agency Legal Materials

Ad Hoc Committee

Proposed Recommendation for Plenary | June 15, 2023

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Agencies produce many kinds of legal materials—that is, documents that establish,
2 interpret, apply, explain, or address the enforcement of legal rights and obligations, along with
3 constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials
4 come in many forms, ranging from generally applicable rules, issued after notice and comment,
5 to orders issued in the adjudication of individual cases. Many statutes govern the public
6 disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal
7 Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to
8 proactively disclose certain materials, either by publishing them in the *Federal Register* or
9 posting them on their websites. Other materials must be made available upon request. Some
10 materials, given their nature or content, are exempt from disclosure.

11 Since its establishment, the Administrative Conference has adopted dozens of
12 recommendations encouraging agencies to proactively disclose important legal materials, even
13 beyond what the law currently requires, and to make them publicly available in a readily

¹ Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, Disclosure of Agency Legal Materials 5 (Feb. 23/May 30, 2023) (draft report to the Admin. Conf. of the U.S.).

² 5 U.S.C. § 552.

³ 41 U.S.C. ch. 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

Commented [CMA1]: Proposed Amendment #1 from Senior Fellow Alan Morrison:

I suggest adding "Proactive" to the title "Disclosure of Agency Legal Materials" lest someone think this is about FOIA-requested disclosures.

DRAFT June 9, 2023



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress
15 could implement through legislative action.

16 Considering the principal statutes governing the disclosure of agency legal materials, the
17 Conference has also identified problems—inconsistencies and uncertainties, for example—that
18 Congress ~~sh~~ould remedy through statutory reforms. Developed at different times and for
19 different purposes, these statutes contain overlapping requirements that are sometimes difficult to
20 harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from
21 1935—and technological developments and organizational changes have rendered certain
22 provisions outdated ~~or obsolete~~. Some statutory provisions are vague, which has led to litigation
23 over their meaning and to differing agency practices. ~~In a few instances, statutes governing the~~
24 ~~disclosure of agency legal materials contain drafting errors.~~⁶

25 To ensure that agencies provide ready public access to important legal materials in the
26 most efficient ~~way possible~~manner, this Recommendation identifies several ~~possible~~ statutory
27 reforms that, if enacted by Congress, would provide clear standards as to what legal materials
28 agencies must publish in the *Federal Register*, post on their websites, or otherwise proactively
29 disclose. ~~The Conference recognizes that these statutory reforms would impose additional~~ initial
30 upfront and ongoing costs on agencies. At the same time, proactive disclosure of agency legal
31 materials may save staff time or money through a reduction in the volume of FOIA requests or
32 printing costs, or an increase in the speed with which agency staff will be able to respond to
33 remaining FOIA requests. In assigning responsibilities for overseeing the development and
34 implementation of the proactive disclosure plans and for overseeing the agency's compliance

Commented [CMA2]: Proposed Amendment #2 from Senior Fellow Alan Morrison:

I suggest that "could" be changed to "should." Agencies "can" almost always do something; the issue is, should they.

Commented [CA3]: Proposed Amendment from Council #1

Commented [CMA4]: Proposed Amendment #1 from Government Member Stephanie Tatham:

We agree that there will be up-front technical costs, operational burden, and agency budget impacts associated with both the proactive disclosures and recommended legal requirements and suggest that some of these costs will be ongoing. Did agencies express views on whether they have the capacity to make this kind of information available absent additional appropriations?

⁵ Recommendations adopted in recent years include Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 Fed. Reg. 2312 (Jan. 13, 2023); 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 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

⁶ See generally Bell et al., *supra* note 1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

35 with all legal requirements for the proactive disclosure of agency legal materials agencies may
36 wish to consider existing officials and the potential for overlapping or shared responsibilities.⁷

37 This Recommendation should not be considered as an exhaustive catalog of useful
38 reforms. For example, it does not address whether the exemptions ~~to~~ from FOIA's general
39 disclosure requirements⁸ should be amended, or recommend actions that may be at odds with
40 FOIA. The statutory reforms proposed in this Recommendation therefore would not require
41 agencies to proactively disclose matters exempted or excluded from FOIA's general disclosure
42 requirements, including "inter-agency or intra-agency memorandums or letters that would not be
43 available by law to a party other than an agency in litigation with the agency." All records
44 identified for proactive disclosure in this Recommendation would still be subject to the
45 exemptions from FOIA, such that if a record were exempt from disclosure upon request, it would
46 be exempt from any proactive disclosure requirement. Congress should also consider timeframes
47 for implementation of the proactive disclosure recommendations, whether for newly created or
48 preexisting agency legal materials.

49 Nothing in this Recommendation should be interpreted to constitute the Conference's
50 interpretation of the statutes governing the disclosure of agency legal materials. Any
51 recommendation that a statutory provision be amended to "provide" something does not
52 necessarily mean that the law does not already require it. Nor should this Recommendation be
53 read as superseding the Conference's many previous recommendations on the disclosure of
54 agency legal materials. In the absence of congressional action Unless and until Congress acts, the
55 Conference encourages agencies to adopt the best practices identified in these and its many
56 previous recommendations.

Commented [CMA5]: Proposed Amendment #2 from Government Member Steph Tatham:

Current-law FOIA, at 5 USC 552(j), states "Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level.)", and directs the Chief FOIA Officer to have agency-wide responsibility for efficient and appropriate compliance with "this section" [the FOIA, including the proactive disclosure provisions.], among other FOIA-related responsibilities.

This recommended new officer has agency-wide responsibility for ensuring compliance with requirements to proactively disclose legal materials, including under FOIA 552(a)(2), as contemplated in Rec. 1. The contemplated new officer has substantial responsibilities which duplicate responsibilities already held by the Chief FOIA Officer, but each has responsibilities the other does not. The Chief FOIA Officer ensures compliance with non-proactive FOIA disclosures and proactive FOIA disclosures of non-legal materials and has other FOIA responsibilities, and the proposed new official ensures compliance with proactive disclosures of legal materials outside the FOIA context (including under the E-Government Act and the Federal Register Act, noted in lines 5-7) and develops the disclosure plans in Rec 3.a..

Agencies may wish to consider the overlapping and shared responsibilities of existing officials as they assign these new responsibilities.

Commented [CA6]: Proposed Amendment from Council #2 (see parallel amendments at lines 54 and 82-83):

The proposed amendment is intended to make clearer that the proposed reforms would not require agencies to proactively disclose matters currently exempted or excluded from disclosure.

Commented [CMA7]: Proposed Amendment #3 from Senior Fellow Alan Morrison:

I think the conference would like agencies to follow these, as well as its prior recommendations, even if Congress does not act. For that reason, I suggest adding "these and" after "identified in."

⁷ For example, 5 USC 552(j), requires agencies to designate a Chief FOIA officer.

⁸ 5 U.S.C. § 552(b).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

- 57 1. Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to ~~P~~paragraph 2 of this
58 Recommendation and the exemptions and exclusions in 5 U.S.C. § 552(b) and (c), that
59 each agency make available on its website:
- 60 a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C.
61 § 554 and 556–557 or otherwise issued after a legally required opportunity for
62 an evidentiary hearing. Each agency should proactively disclose any such opinion
63 or order regardless of whether the agency designates the opinion or order as
64 precedential, published, or other similar designation;
 - 65 b. Written documents that communicate to a member of the public the agency’s
66 decision not to enforce a legal requirement against an individual or entity. Such
67 documents may include decisions to grant an individual or entity a waiver or
68 exemption, and advisory opinions that apply generally applicable legal
69 requirements to specific facts or explain how the agency will exercise its
70 discretion in particular cases;
 - 71 c. Written legal opinions and memoranda issued by or under the authority of its
72 chief legal officers that bind agency officials as a matter of law in the
73 performance of their duties;
 - 74 d. Settlement agreements to which the agency is a party;
 - 75 e. Memoranda of understanding, memoranda of agreement, and other similar inter-
76 agency or inter-governmental agreements that affect a member of the public;
 - 77 f. Any operative agency delegations of legal authority; ~~and~~
78 g. Any operative orders of succession for agency positions whose occupants must be
79 appointed by the President with the advice and consent of the Senate; ~~and~~
80 g-h. Any statutory or agency determinations of first assistant positions to positions
81 whose occupants must be appointed by the President with the advice and consent
82 of the Senate.

Commented [CA8]: Proposed Amendment from Council #2 (see parallel amendments at lines 35-42 and 82-83)

Commented [CA9]: Proposed Amendment from Council #3:
Under the Federal Vacancies Reform Act, first assistants are the default acting official.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 83 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,
 84 pursuant to notice and receipt of public comment, except for good cause pursuant to 5
 85 U.S.C. § 553, providing that it will not proactively disclose some records described in
 86 Paragraph 1 of this Recommendation and subject to the exemptions and exclusions in 5
 87 U.S.C. § 552(b) and (c), because individual records in the relevant category do not vary
 88 considerably in terms of their factual contexts or the legal issues they raise, or that
 89 proactive disclosure of such documents would be misleading. Any such rule should
 90 explain which records the agency will not proactively disclose and what other
 91 information (e.g., aggregate data, representative samples), if any, the agency will
 92 proactively disclose instead to adequately inform the public about agency activities.
- 93 3. Congress should require ~~the Office of Management and Budget (OMB) to ensure that~~
 94 ~~agencies to:~~
- 95 a. ~~De~~develop and post disclosure plans—internal management plans and procedures
 96 for making legal materials available online on their websites; and
 - 97 b. ~~De~~esignate ~~an officer or officers~~ responsible for overseeing the development and
 98 implementation of the proactive disclosure plans described in Paragraph 3(a),
 99 and for overseeing the agency’s compliance with all legal requirements for the
 100 proactive disclosure of agency legal materials.
- 101 4. Because various provisions of the E-Government Act, ~~Public Law Number No.~~ 107-
 102 347, governing proactive disclosure are duplicative, contain drafting errors, or are
 103 outdated, Congress should amend the statute to:
- 104 a. Delete § 206(b);
 - 105 b. Delete “and (b)” in § 207(f)(1)(A)(ii);
 - 106 c. Eliminate references to the Interagency Committee on Government Information,
 107 which no longer exists. Congress should instead require that ~~OMB~~the Office of
 108 ~~Management and Budget~~, after consultation with ~~the Federal Web Managers~~
 109 ~~Council~~other relevant inter-agency bodies, periodically update its guidance on
 110 federal agency public websites at least every two years to ensure that agencies
 111 present legal materials, as appropriate, on their websites in a clear, logical, and
 112 readily accessible fashion.

Commented [CA10]: Proposed Amendment from Council #4:
 Why couldn't agencies issue these regulations without notice and comment under the agency management/organization/practice exceptions to the APA? These seem like the paragon example of what could be covered -- see Public Citizen v. Department of State, 276 F.3d 634 (D.C. Cir. 2002).

Commented [CA11]: Proposed Amendment from Council #2 (see parallel amendments at lines 35-42 and 54)

Commented [CMA12]: Proposed Amendment #3 from Government Member Stephanie Tatham:
 Thank you for thinking of OMB but we recommend that the Conference revert to the more direct formulation that places responsibilities on the agencies this recommendation would seek to obligate. OMB is not currently well-situated to provide this oversight.

Commented [CMA13]: Proposed Amendment #4 from Government Member Stephanie Tatham:
 Or officers?

Commented [CMA14]: Proposed Amendment #5 from Government Member Stephanie Tatham:
 Suggest referring to other relevant inter-agency bodies, as there are several with which OMB may consult (i.e., Federal Web Managers Council, federal Chief Information Officers Council, Federal Records Management Council, etc.) and as the relevant bodies may change and evolve over time.

Commented [CA15]: Proposed Amendment from Council #5:
 The proposed amendment would give OMB discretion to update its guidance as needed and consistent with available resources and other priorities.

Commented [CMA16R15]: Comment from Government Member Stephanie Tatham:
 OMB seeks to update this guidance periodically, as needed.

Commented [CMA17]: Proposed Amendment #6 from Government Member Stephanie Tatham:
 We recommend a qualifier to indicate that this is not all legal materials.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 113 5. Congress should provide that each agency should post each of its legislative rules on its
114 website, and should, to the extent feasible, include links to related agency legal materials,
115 such as guidance documents explaining the rule or significant adjudicative opinions
116 interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

- 117 6. Congress should provide that a person may use the process described in 5 U.S.C.
118 § 552(a)(3) to request that an agency proactively disclose certain existing records when
119 the requestor alleges the agency is legally required to proactively disclose the records but
120 has not done so.
- 121 7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an
122 agency has not proactively disclosed records when legally required to do so, the
123 reviewing court may order the agency to ~~proactively disclose them~~ make them available to
124 the general public in the manner required by the proactive disclosure provisions of 5
125 U.S.C. § 552(a), in the manner required by law. Congress should also provide that a
126 requester must exhaust administrative remedies required by 5 U.S.C. § 552 before filing a
127 complaint in district court to compel an agency to proactively disclose records.

Official Edition of *Federal Register*

- 128 8. Congress should provide that the online version of the *Federal Register*, which is
129 currently an unofficial informational resource, is the official edition of the *Federal*
130 *Register* and eliminate any statutory requirement in 44 U.S.C. Chapter 15 or elsewhere
131 that the printed version of the *Federal Register* is the official edition.

Preparation of Proposed Legislation

- 132 9. The Conference's Office of the Chair should prepare and submit to Congress proposed
133 statutory changes consistent with this Recommendation.

Commented [CMA18]: Comment #7 from Government Member Stephanie Tatham:

Is this referring to regulatory text or also the preamble? Suggest that a link to the e-CFR and/or Federal Register notice (GovInfo?) should suffice.

Commented [CMA19]: Proposed Amendment #8 from Government Member Stephanie Tatham:

Certain already-existing records? Or certain categories of records, such that future-created records might be within the scope of the request? If the latter, how could an agency issue a final "determination" on the request if it is impossible to ever have fully discharged its obligations to the requester?

Commented [CA20]: Proposed Amendment from Council #6:

The proposed amendment is intended to clarify the nature of the remedy.