Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation for Committee | October 19, 2021

RECOMMENDATION

Objectives of Public Access to Agency Adjudicative Proceedings

1. Agencies should identify the objectives of public access to adjudicative proceedings and design policies to serve them. When identifying the objectives of public access and designing rules and policies to serve those objectives, agencies should be attentive to constitutional requirements for public access and any applicable statutory requirements, including those relating to the disclosure or nondisclosure of certain types of information.

Policies for Public Access to Agency Adjudicative Proceedings

2. Agencies should promulgate and publish procedural regulations governing public access to adjudicative proceedings in the Federal Register and codify them in the Code of Federal Regulations. These regulations should cover all significant matters pertaining to public access to adjudicative proceedings, including the following:
   a. Standards for determining which proceedings are presumptively open or closed to public observation and any circumstances in which adjudicators may or must depart from that presumption in individual cases;
   b. The manners in which members of the public ordinarily can observe open proceedings, for example by attending in person at a specific location (e.g., at an agency office) or by remote means (e.g., online or by telephone);
c. Requirements, if any, for advance public notice of proceedings; and

d. The public availability of and means of accessing transcripts and recordings of
proceedings.

3. Agencies should develop guidelines that explain, in plain language:
   a. When adjudicative proceedings are open and closed to public observation under
      the procedural regulations recommended in paragraph 2;
   b. Where and how members of the public can observe open proceedings;
   c. Whether members of the public need to register before attending open
      proceedings;
   d. Any expectations for decorum by public observers at open proceedings (e.g.,
      regarding the use of electronic devices and audiovisual equipment);
   e. Whom members of the public should contact if they have questions about
      observing proceedings;
   f. Instructions for accessing agency or non-agency facilities at which members of
      the public can observe open proceedings;
   g. Instructions for reporting on proceedings (e.g., information about media inquiries
      and use of audiovisual equipment); and
   h. Policies for managing proceedings that attract high levels of public interest.

4. Agencies should publish the regulations described in paragraph 2, the guidelines
   described in paragraph 3, and any other information about public access to adjudicative
   proceedings, in an appropriate location on their websites.

   Standards and Procedures for Determining Which Adjudicative Proceedings Are
   Open or Closed

5. Agencies should adopt the presumption that evidentiary hearings and appellate
proceedings (including oral argument) are open to public observation and may be closed,
in whole or in part, only to the extent necessary to protect one or more of the following
interests:
   a. National security;
b. Law enforcement interests;
c. Confidential business information;
d. Participants’ privacy; or
e. Other interests or categories of information protected by law.

For programs in which it is likely that the need to protect one or more of these interests or categories of information will ordinarily outweigh the public interest in open proceedings, it may be appropriate to adopt the presumption that evidentiary hearings and appellate proceedings are closed to public observation while retaining the ability to open these proceedings, in whole or in part, in particular cases or to particular individuals.

6. Agencies should consider whether types of adjudicative proceedings other than evidentiary hearings and appellate proceedings should be presumptively open or closed to public observation, while retaining the ability to depart from that presumption in particular cases. In developing policies regarding public access to particular types of proceedings other than evidentiary hearings and appellate proceedings, agencies should consider, at a minimum, the following:

   a. Whether public access to proceedings of that type would promote important policy objectives such as transparency, fairness to parties, accurate and efficient development of records for decisionmaking, or public participation;
   b. Whether public access to proceedings of that type would impede important policy objectives such as encouraging candor, achieving consensus, deciding cases and resolving disputes in an efficient manner, preventing intimidation or harassment of participants, avoiding unwarranted reputational harm to participants, or protecting national security, law enforcement, confidentiality of business documents, participants’ privacy, or other interests or categories of information protected by law;
   c. Whether proceedings of that type or a broader adjudication process includes opportunities for public access;
   d. Whether there is often public interest in observing proceedings of that type;
   e. Whether matters to be discussed at proceedings of that type ordinarily involve
issues of broad public interest or the interests of persons beyond the parties; and
f. Whether members of the public can easily inspect or obtain copies of transcripts, recordings, or summaries of proceedings of that type.

7. Agencies should consider the process for departing from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in procedural regulations:

a. How parties to a case can request that proceedings that are presumptively open to public observation be closed or that proceedings that are presumptively closed to public observation be open to particular individuals or the general public;

b. How individuals who are not parties to a case can request access, for themselves or the general public, to proceedings that are presumptively closed to public observation;

c. Who can respond or object to requests regarding public access, and how such requests should be made;

d. Whether adjudicators or other agency officials can, on their own motion, close proceedings that are presumptively open to public observation or open proceedings that are presumptively closed to public observation;

e. Whether and how adjudicators or other agency officials must document and notify participants about decisions regarding public access; and

f. Who, if anyone, can appeal decisions regarding public access and, if so, when, how, and to whom they may do so.

Manner of Public Observation of Open Adjudicative Proceedings

8. When adjudicators conduct open proceedings in public hearing rooms, members of the public should have the opportunity to observe the proceedings from the rooms in which they are conducted subject to reasonable security protocols, resource and space constraints, and concerns about disruptions.

9. Agencies should provide members of the public the opportunity to observe open adjudicative proceedings remotely, such as by providing a dial-in number or
livestreaming audio or video of the proceedings online. Agencies should structure remote access in a way that avoids disruptions, such as by ensuring that public observers who are not entitled to participate in proceedings can only observe them and cannot interact with participants or other observers by unmuting themselves, sharing visual content or annotating shared documents, or using chat or file sharing features common in internet-based videoconferencing software.

10. Agencies should consider whether interested members of the public, communities, and organizations are likely to encounter any barriers to accessing open adjudicative proceedings. Agencies should consider, for example, whether any measures are needed to accommodate people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted or obtain access to electronic devices or private internet services necessary to observe proceedings remotely, and whether security protocols at the facilities where proceedings are conducted or other factors make in-person attendance difficult or impractical.

Advance Public Notice of Open Adjudicative Proceedings

11. Agencies should consider whether it would be beneficial to provide advance public notice of open adjudicative proceedings and publicize them. Agencies that determine that advance public notice would be beneficial should consider (a) the best places and publications for providing such notice, (b) the information provided in the notice, and (c) the timing of the notice. Agencies that regularly conduct open proceedings should also consider maintaining a schedule of and information about upcoming proceedings in an appropriate location on their websites.

12. To determine the best places and publications for providing advance public notice of open adjudicative proceedings, agencies should consider their needs and available resources and the individuals, communities, and organizations that are likely to be interested in or affected by such proceedings. Places and publications where agencies can provide public notice of open proceedings include:

a. The Federal Register;
b. A press release, digest, newsletter, or blog post published by the agency;

c. An agency events calendar;

d. Social media;

e. A newspaper or other media outlet that members of the public who may be
interested in observing the proceeding are likely to monitor;

f. A physical location that potentially interested members of the public are likely to
see (e.g., a bulletin board at a jobsite or agency office);

g. An email sent to persons who have subscribed to a mailing list or otherwise opted
to receive updates about a particular adjudication; or

h. A communication sent directly to members of the public, communities, and
organizations who may be interested in observing the proceeding.

13. Agencies should include the following information in any public notice for an open
adjudicative proceeding, as applicable:

  a. The name and docket number or other identification for the proceeding;

  b. The date and time of the proceeding;

  c. The ways that members of the public can observe the proceeding, along with any
requirements for registering or requesting access to the proceeding and, for in-
person observers, instructions for accessing the facility where the proceeding will
take place;

  d. A brief summary of the proceeding’s purpose; and

  e. Contact information for a person who can answer questions about the proceeding.

14. Agencies should determine the appropriate timing for providing public notice of open
adjudicative proceedings given the nature of their programs and the proceeding at issue.
More advance notice may be warranted, for example, if there is likely to be significant
public interest in a proceeding and interested members of the public will need to travel to
observe it.

**Public Access to Transcripts and Recordings of Adjudicative Proceedings**

15. Consistent with applicable constitutional and statutory requirements and the objectives
identified in paragraph 1, agencies should consider whether and how they make
transcripts and recordings of adjudicative proceedings available to interested members of
the public. To provide public access to such records, an agency can, for example:

a. Post transcripts and recordings in an appropriate location on their websites, for
   example in an electronic docket system;

b. Make transcripts and recordings available for public inspection on a website not
   controlled by the agency, such as a public video sharing website, but only after
   carefully weighing the costs and benefits of doing so;

c. Make transcripts and recordings available for public inspection in a reading room,
   docket office, or other agency facility;

d. Provide copies of transcripts and recordings on request, at no cost to the requestor
   or for a fee established by a rule published consistent with the Freedom of
   Information Act; or

e. Arrange for court reporters who transcribe or record proceedings under contract
   with the government to provide copies of such records on request, at no cost to the
   requestor or for a fee that fairly represents the costs to and services provided by
   the contractor.

16. Agencies should take steps to redact any information that is protected by law or policy
from public disclosure before providing public access to transcripts and recordings.