



Adjudication Materials on Agency Websites

Committee on Administration and Management

Proposed Recommendation for Committee | March 27, 2017

1 In contrast to federal court records, which are available for download from the judiciary’s
2 Public Access to Court Electronic Records (PACER) program (for a fee), or records produced
3 during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking
4 website www.regulations.gov, there exists no single, comprehensive online clearinghouse for the
5 public hosting of decisions and other materials generated throughout the course of federal
6 administrative adjudication.¹ Instead, to the extent a particular adjudication record is digitally
7 available, it is likely to be found on the relevant agency’s website.

8 Federal administrative adjudication² affects an enormous number of individuals and
9 businesses engaged in a range of regulated activities or dependent on any of the several
10 government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions,
11 and other records generated by agencies and parties involved in adjudication bespeak the
12 procedural complexities and sophistication of many proceedings. Insofar as adjudicative
13 proceedings encompass the application of federal power in the disposition of disputes involving
14 private parties, the records associated with such proceedings are of public importance. Further,

¹ The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will likely consider whether the issue merits attention in the future. In the meantime, the scope of this recommendation is limited to an examination of agencies’ respective websites.

² This recommendation is confined to records issued or file in adjudication proceedings that are based on oral or written hearings in which one or more parties have an opportunity to introduce evidence or make arguments. The preamble to Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016), refers to such proceedings as “Type A” and “Type B” adjudication. Type A adjudication consists of proceedings that are regulated by the procedural provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-559, and are commonly referred to as “formal adjudication.” Type B adjudication consists of proceedings that, while not regulated by the APA’s adjudication provisions, are nonetheless subject to legally required evidentiary hearings. Type B proceedings are, along with what the preamble terms “Type C adjudication” (proceedings not subject to legally required evidentiary hearings), commonly referred to as “informal adjudication.”



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15 administrative adjudication records can serve as ready-made models for private parties
16 (especially those who are self-represented)³ in drafting their own materials, and may provide
17 insight into the laws and procedures governing proceedings.

18 Many federal laws and directives mandate or encourage the online disclosure of
19 important government materials, including certain adjudicatory records. The Freedom of
20 Information Act (FOIA) requires that agencies electronically disclose “final opinions, including
21 concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”⁴ The
22 prevailing interpretation of this provision limits its ambit to “precedential” decisions.⁵
23 Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of
24 2016,⁶ encourage more expansive online disclosure of federal records.⁷

25 In the absence of a comprehensive, government-wide platform akin to PACER or
26 www.regulations.gov, agencies generally rely on their individual websites to comply with online
27 transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases,
28 supporting records produced during adjudicative proceedings. Some agencies host relatively
29 accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all
30 agency websites, however, are equally navigable or robust. Additionally, in providing online
31 access to adjudication materials, agencies utilize navigational and organizational tools and
32 techniques in various ways.

³ The Conference recently adopted a recommendation that offered best practices for agencies to consider in assisting self-represented parties in administrative hearings. *See* Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

⁴ 5 U.S.C. § 552(a)(2)(A).

⁵ *See* U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967); U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.).

⁶ Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies’ records management programs provide “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” *Id.* § 3102(2).

⁷ *See, e.g.*, Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish “public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely”).



33 This recommendation offers best practices and factors for agencies to consider as they
34 seek to increase the accessibility of adjudication materials on their websites and maintain
35 comprehensive, representative online collections of adjudication materials, consistent with a
36 balancing of the transparency objectives and privacy considerations of FOIA and other relevant
37 laws and directives.⁸ It is offered with the knowledge that all agencies are subject to unique
38 programming, stakeholder, and financial constraints, and that the distinctiveness of agencies'
39 adjudicative schemes limits the development of workable standardized practices. To the extent
40 agencies are required to expend additional resources in implementing this recommendation, any
41 upfront costs incurred may be accompanied by offsetting tangible benefits, whether in the form
42 of staff time or money saved through a reduction in the volume of FOIA requests or printing
43 costs or an increase in the speed with which agency staff will be able to respond to remaining
44 FOIA requests. In addition, there may also be more intangible benefits engendered by increased
45 public trust and stakeholder satisfaction.

RECOMMENDATION

46 Disclosure of Adjudication Materials

- 47 1. Agencies should consider maintaining links on their websites to copies of all decisions and
48 supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudication
49 proceedings in excess of the disclosure requirements of the Freedom of Information Act,
50 subject to relevant law. In determining which materials to disclose, agencies should take into
51 account the following factors:
- 52 a. the interests of the public and relevant stakeholders in gaining insight into the
53 agency's internal processes;
 - 54 b. the costs to the agency in disclosing adjudication materials in excess of the Freedom
55 of Information Act's requirements;
 - 56 c. any offsetting benefits the agency may realize in disclosing the same;

⁸ For the report undergirding this recommendation, see Daniel J. Sheffner, Adjudication Materials on Agency Websites (March 6, 2017) (draft report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/Adjudication%20Materials%20on%20Agency%20Websites%20%28March%206%2C%202017%29_0.pdf.



- 57 d. the privacy interests of individuals and entities that are the subject of adjudication
58 materials; and
59 e. any other relevant considerations, such as agency-specific adjudicatory practices.
- 60 2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of
61 their factual contexts or the legal analyses employed in their dispositions should consider
62 disclosing materials from representative examples of cases on their websites.

63 **Access to Adjudication Materials**

- 64 3. Agencies that choose to post all or nearly all decisions and supporting materials filed in
65 adjudicative proceedings should endeavor to group materials from the same proceedings
66 together.
- 67 4. Agencies should endeavor to ensure that visitors to their websites are able to easily locate
68 adjudication materials by
- 69 a. displaying links to agency adjudication sections in easily accessible locations on the
70 website, as well as by maintaining a search engine and a site map or index, or both,
71 on or locatable from the homepage;
- 72 b. offering relevant filtering and advanced search options in conjunction with their main
73 search engines that allow users to identify with greater detail the records or types of
74 records for which they are looking, such as options to sort, narrow, or filter searches
75 by record type, action or case type, date, case number, party, or specific words or
76 phrases; and,
- 77 c. offering general and advanced search and filtering options specifically within the
78 sections of their websites that disclose adjudication materials to sort, narrow, or filter
79 searches by the ways suggested in subparagraph (b).