Adjudication Materials on Agency Websites

Committee on Administration and Management

Proposed Recommendation for Committee | March 27, 2017

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

Federal administrative adjudication² affects an enormous number of individuals and businesses engaged in a range of regulated activities or dependent on any of the several government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions, and other records generated by agencies and parties involved in adjudication bespeak the procedural complexities and sophistication of many proceedings. Insofar as adjudicative proceedings encompass the application of federal power in the disposition of disputes involving 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.”
administrative adjudication records can serve as ready-made models for private parties (especially those who are self-represented)\(^3\) in drafting their own materials, and may provide insight into the laws and procedures governing proceedings.

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

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


\(^5\) 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”).
This recommendation offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with a balancing of the transparency objectives and privacy considerations of FOIA and other relevant laws and directives. It is offered with the knowledge that all agencies are subject to unique programming, stakeholder, and financial constraints, and that the distinctiveness of agencies’ adjudicative schemes limits the development of workable standardized practices. To the extent agencies are required to expend additional resources in implementing this recommendation, any upfront costs incurred may be accompanied by offsetting tangible benefits, whether in the form of staff time or money saved through a reduction in the volume of FOIA requests or printing costs or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests. In addition, there may also be more intangible benefits engendered by increased public trust and stakeholder satisfaction.

RECOMMENDATION

Disclosure of Adjudication Materials

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

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d. the privacy interests of individuals and entities that are the subject of adjudication materials; and
e. any other relevant considerations, such as agency-specific adjudicatory practices.

2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing materials from representative examples of cases on their websites.

**Access to Adjudication Materials**

3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should endeavor to group materials from the same proceedings together.

4. Agencies should endeavor to ensure that visitors to their websites are able to easily locate adjudication materials by
   a. displaying links to agency adjudication sections in easily accessible locations on the website, as well as by maintaining a search engine and a site map or index, or both, on or locatable from the homepage;
   b. offering relevant filtering and advanced search options in conjunction with their main search engines that allow users to identify with greater detail the records or types of records for which they are looking, such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases; and,
   c. offering general and advanced search and filtering options specifically within the sections of their websites that disclose adjudication materials to sort, narrow, or filter searches by the ways suggested in subparagraph (b).