



## Public Access to Agency Adjudicative Proceedings

### Committee on Adjudication

#### Proposed Recommendation from Committee on Adjudication | November 22, 2021

1           Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse,  
2 as are the processes they use to do so. Some processes are trial-like; others are informal. Some  
3 are adversarial; others are non-adversarial. Agencies conduct many different types of  
4 proceedings in the course of adjudicating cases, such as investigatory hearings, prehearing and  
5 scheduling conferences, settlement conferences, evidentiary hearings, and appellate arguments.  
6 Members of the public—participants’ family and friends, media representatives, representatives  
7 of non-governmental organizations, researchers, and others—may seek to observe adjudicative  
8 proceedings for any number of reasons.

9           Agencies must determine whether and how to allow public access to the proceedings they  
10 conduct. The Constitution and federal statutes establish the basic parameters for that  
11 determination. The Supreme Court has interpreted the First Amendment to provide a general  
12 right of public access to judicial proceedings,<sup>1</sup> and a number of federal courts have held that the  
13 same right extends to at least some proceedings conducted by administrative agencies.<sup>2</sup> Federal  
14 statutes, such as the Government in the Sunshine Act<sup>3</sup> and certain statutes specific to particular  
15 programs and agencies, require that agencies open or close adjudicative proceedings or certain

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<sup>1</sup> *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980).

<sup>2</sup> See Jeremy Graboyes & Mark Thomson, *Public Access to Agency Adjudicative Hearings 10–12* (Oct. 15, 2021) (draft report to the Admin. Conf. of the U.S.).

<sup>3</sup> 5 U.S.C. § 552b.



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16 portions thereof to public observation. Agencies may need to transcribe or record certain  
17 adjudicative proceedings and may be required, under the Federal Advisory Committee Act<sup>4</sup> or  
18 other laws, to make such records publicly available.<sup>5</sup> Conversely, the Privacy Act<sup>6</sup> and other  
19 laws and executive-branch policies may require agencies to protect sensitive interests and  
20 information.

21 On top of these constitutional and statutory requirements, many agencies have adopted  
22 their own policies regarding public access to adjudicative proceedings.<sup>7</sup> Settling on a sound  
23 policy for determining which proceedings should be open to public observation can require  
24 balancing different, and sometimes conflicting, interests. Proceedings open to public observation  
25 promote transparency, public accountability, and public understanding of agency decision  
26 making. Openness encourages fair process for private parties and promotes accurate and efficient  
27 decision making by subjecting arguments and evidence to public scrutiny. And many  
28 participants, especially self-represented parties, people with disabilities, and children, benefit  
29 from having a family member, friend, personal care attendant, case worker, or other supportive  
30 member of the public present at their proceedings.

31 As with any legal proceeding, however, there can be drawbacks to opening adjudicative  
32 proceedings to the public. Many adjudications involve sensitive information that would be  
33 publicly disclosed in an open proceeding. Public disclosure of unverified information or

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<sup>4</sup> 5 U.S.C. App. 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” 5 U.S.C. App. 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* 11(b).

<sup>5</sup> The Administrative Conference has recommended that agencies consider providing access on their websites to supporting adjudicative materials issued and filed in adjudicative proceedings. Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017). Online disclosure of transcripts and recordings of adjudicative proceedings and real-time broadcast of open proceedings can save staff time or money through a reduction in the volume of Freedom of Information Act (FOIA) requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests.

<sup>6</sup> *Id.* § 552a.

<sup>7</sup> See Graboyes & Thomson, *supra* note 2.



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34 unproven allegations may result in unwarranted reputational harm to private parties. Just as open  
35 proceedings allow family members and other supportive members of the public to accompany  
36 participants, they also allow in those who would intimidate or harass. Openness may also affect  
37 the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to  
38 become unduly adversarial or protracted. There can also be administrative costs associated with  
39 facilitating in-person or remote observation of adjudicative proceedings by members of the  
40 public, providing advance public notice of open proceedings, and providing access to transcripts  
41 and recordings of open proceedings. These costs may be warranted in some circumstances but  
42 not others.

43 This Recommendation recognizes that agency adjudicative proceedings vary widely in  
44 their purpose, complexity, and governing law and the degree of public interest they attract. It also  
45 recognizes that not all agencies can bring the same resources to bear in addressing public access  
46 to their adjudicative proceedings. In offering these best practices, the Administrative Conference  
47 encourages agencies to develop policies that, in addition to complying with all relevant  
48 constitutional and statutory requirements for public access, recognize the benefits of public  
49 access for members of the public, private parties, agencies, and other participants and account for  
50 any countervailing interests, such as privacy and confidentiality.

### RECOMMENDATION

#### **Policies for Public Access to Agency Adjudicative Proceedings**

- 51 1. Agencies should promulgate and publish procedural regulations governing public access  
52 to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of*  
53 *Federal Regulations*. In formulating these regulations, agencies, in addition to adhering  
54 to any constitutional or statutory requirements for public access, should consider the  
55 benefits of public access and countervailing interests, such as privacy and confidentiality,  
56 as elaborated in Paragraph 6. These regulations should include the following:
- 57 a. A list of proceedings that should be categorically or presumptively open or  
58 closed, and standards for determining when adjudicators may or must depart from



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- 59 such presumption in individual cases (see Paragraphs 5–7);
- 60 b. The manners in which members of the public can observe open proceedings, for
- 61 example by attending in person (e.g., at an agency hearing room) or by remote
- 62 means (e.g., online or by telephone) (see Paragraphs 8–14);
- 63 c. Requirements, if any, for advance public notice of proceedings, whether open or
- 64 closed (see Paragraphs 11–14); and
- 65 d. The public availability of and means of accessing transcripts and audio and video
- 66 recordings of proceedings (see Paragraphs 15–17).
- 67 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in
- 68 plain language, the following information for proceedings that are open to the public:
- 69 a. The manner in which agencies will communicate the schedule of upcoming
- 70 proceedings to the public;
- 71 b. The location at and manner in which members of the public can observe
- 72 proceedings;
- 73 c. The registration process, if any, required for members of the public to observe
- 74 proceedings and how they should register;
- 75 d. The agency official whom members of the public should contact if they have
- 76 questions about observing proceedings;
- 77 e. Any instructions for accessing agency or non-agency facilities where proceedings
- 78 are held;
- 79 f. Any requirements for conduct by public observers (e.g., regarding the possession
- 80 and use of electronic devices);
- 81 g. Any protocols for facilitating media coverage; and
- 82 h. Any policies for managing proceedings that attract high levels of public interest.
- 83 3. Agencies should also consider whether presumptively closed proceedings may be open to
- 84 select members of the public, such as family members or caregivers, and, if so, develop
- 85 guidelines for such situations that address, as relevant, the information in Paragraph 2.
- 86 4. Agencies should post the regulations described in Paragraph 1, the guidelines described
- 87 in Paragraphs 2 and 3, and any other information about public access to adjudicative



88 proceedings, in an appropriate location on their websites.

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

89 5. Agencies should adopt the presumption that evidentiary hearings and appellate  
90 proceedings (including oral arguments) are open to public observation and may be  
91 closed, in whole or in part, only to the extent consistent with the First Amendment and  
92 other potential constitutional and statutory bases for requiring open proceedings, and only  
93 to the extent necessary to protect compelling interests such as:

- 94 a. National security;
- 95 b. Law enforcement interests;
- 96 c. Confidentiality of sensitive business information;
- 97 d. Especially sensitive personal privacy interests;
- 98 e. The interests of minors and juveniles; and
- 99 f. Other interests protected by statute or regulation.

100 In some programs, it may be that the need to protect one or more of these interests or  
101 categories of information will ordinarily outweigh the public interest in open  
102 proceedings. For such programs, agencies may presume that all parts of proceedings will  
103 be closed to public observation while retaining the ability to open these proceedings, in  
104 whole or in part, in particular cases or to particular individuals.

105 6. Agencies should consider whether types of adjudicative proceedings other than  
106 evidentiary hearings and appellate proceedings (such as investigatory hearings and  
107 prehearing conferences), which are typically closed, should be open to public  
108 observation. In doing so, agencies, in addition to adhering to any constitutional or  
109 statutory requirements for public access, should consider, at a minimum, the following:

- 110 a. Whether public access would promote important policy objectives such as  
111 transparency, fairness to parties, accurate and efficient development of records for  
112 decisionmaking, or public participation in agency decision making;
- 113 b. Whether public access would impede important policy objectives such as



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- 114 encouraging candor, achieving consensus, deciding cases and resolving disputes  
115 in an efficient manner, preventing intimidation or harassment of participants,  
116 avoiding unwarranted reputational harm to participants, or protecting national  
117 security, law enforcement, confidentiality of sensitive business information,  
118 especially sensitive personal privacy interests, the interests of minors and  
119 juveniles, and other similarly compelling interests;
- 120 c. Whether such proceedings or the broader adjudication process of which the  
121 proceeding at issue is a part typically include opportunities for public access;
- 122 d. Whether there is often public interest in observing such proceedings; and
- 123 e. Whether matters to be discussed at such proceedings ordinarily involve issues of  
124 broad public interest or the interests of persons beyond the parties.
- 125 7. Agencies should adopt processes for departing from or considering requests to depart  
126 from a presumption of open or closed proceedings in particular cases. Agencies should  
127 consider addressing the following topics in the procedural regulations described in  
128 Paragraph 1:
- 129 a. How parties to a case can request that proceedings that are presumptively open to  
130 public observation be closed or that proceedings that are presumptively closed to  
131 public observation be open to particular individuals or the general public;
- 132 b. How non-parties to a case can request access, for themselves or the general  
133 public, to proceedings that are presumptively closed to public observation;
- 134 c. How parties and non-parties can respond or object to requests regarding public  
135 access made in subparagraphs (a) or (b);
- 136 d. Under what circumstances adjudicators or other agency officials can, on their own  
137 motion, close proceedings that are presumptively open to public observation or  
138 open proceedings that are presumptively closed to public observation;
- 139 e. Whether and how adjudicators or other agency officials must document and notify  
140 participants about decisions regarding public access; and
- 141 f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to  
142 whom, and how they may do so.



**Manner of Public Observation of Open Adjudicative Proceedings**

- 143 8. When adjudicators conduct open proceedings in public hearing rooms, members of the  
144 public should have the opportunity to observe the proceedings from the rooms in which  
145 they are conducted, subject to reasonable security protocols, resource and space  
146 constraints, and concerns about disruptions.
- 147 9. Agencies should provide all or select members of the public the opportunity to observe  
148 open adjudicative proceedings remotely. Agencies should provide remote access in a way  
149 that is appropriate for a particular proceeding, such as by providing a dial-in number to  
150 select members of the public on request or by livestreaming audio or video of the  
151 proceedings to the general public online. Agencies should structure remote access in a  
152 way that avoids disruptions, such as by ensuring that public observers cannot unmute  
153 themselves or use chat, screen-sharing, document-annotation, file-sharing functions  
154 common in internet-based videoconferencing software. Agencies should be aware that  
155 members of the public, including the press, may choose to record and disseminate audio  
156 or video transmissions in whole or in part regardless of the rules that may apply in  
157 physical hearing rooms.
- 158 10. Agencies should consider whether interested members of the public are likely to  
159 encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to  
160 remedy them. For example, measures may be needed to accommodate people with  
161 disabilities, people for whom it may be difficult to make arrangements to travel to  
162 locations where proceedings are conducted, and people who do not have access to  
163 electronic devices or private internet services necessary to observe proceedings remotely.  
164 Agencies may also need to adjust security protocols at the facilities where proceedings  
165 are conducted to facilitate in-person attendance while still accounting for reasonable  
166 security needs.



### Advance Public Notice of Adjudicative Proceedings

- 167 11. Agencies should provide advance public notice of open adjudicative proceedings and  
168 consider whether to provide advance public notice of closed proceedings, so that the  
169 public is aware of such proceedings and can request access to them as specified in  
170 Paragraph 7(b). Agencies that determine that advance public notice would be beneficial  
171 should consider (a) the best places and publications for providing such notice, (b) the  
172 information provided in the notice, and (c) the timing of the notice. Agencies that  
173 regularly conduct open proceedings should also consider maintaining a schedule of and  
174 information about upcoming proceedings in an appropriate location on their websites.
- 175 12. To determine the best places and publications for providing advance public notice of  
176 adjudicative proceedings, agencies should consider their needs and available resources  
177 and the individuals, communities, and organizations that are likely to be interested in or  
178 affected by such proceedings. Places and publications where agencies might provide  
179 public notice of proceedings include:
- 180 a. The *Federal Register*;
  - 181 b. A press release, digest, newsletter, or blog post published by the agency;
  - 182 c. An agency events calendar;
  - 183 d. Social media;
  - 184 e. A newspaper or other media outlet that members of the public who may be  
185 interested in observing the proceeding are likely to monitor;
  - 186 f. A physical location that potentially interested members of the public are likely to  
187 see (e.g., a bulletin board at a jobsite or agency office);
  - 188 g. An email sent to persons who have subscribed to a mailing list or otherwise opted  
189 to receive updates about a particular adjudication; and
  - 190 h. A communication sent directly to members of the public, communities, and  
191 organizations who may be interested in observing the proceeding.
- 192 13. Agencies should include the following information in any public notice for an open  
193 adjudicative proceeding, as applicable:



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- 194 a. The name and docket number or other identifying information for the proceeding;  
195 b. The date and time of the proceeding;  
196 c. The ways that members of the public can observe the proceeding, along with the  
197 directions, if any, for registering or requesting access to the proceeding and, for  
198 in-person observers, instructions for accessing the facility where the proceeding  
199 will take place, including any security or public health protocols and disability  
200 accommodations;  
201 d. A brief summary of the proceeding's purpose; and  
202 e. Contact information for a person who can answer questions about the proceeding.
- 203 14. Agencies should determine the appropriate timing for providing and updating public  
204 notice of adjudicative proceedings given the nature of their programs and the proceeding  
205 at issue. More advance notice may be warranted, for example, if significant public  
206 interest in an open proceeding is likely and interested members of the public will need to  
207 travel to observe it in person.

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

- 208 15. Consistent with applicable constitutional and statutory requirements and the objectives  
209 identified in Paragraph 1, agencies should consider how they make transcripts and  
210 recordings of adjudicative proceedings available to interested members of the public. In  
211 addition to providing public access to such materials on their websites, an agency might  
212 also, as appropriate:
- 213 a. Make transcripts and recordings available for public inspection in a reading room,  
214 docket office, or other agency facility;  
215 b. Make transcripts and recordings available for public inspection on another public  
216 website, such as a public video sharing website; or  
217 c. Provide, or arrange for court reporters working under contract with the  
218 government to provide, copies of transcripts and recordings on request for a fee  
219 that is no more than the actual cost of duplication, though the agency may charge  
220 a reasonable, additional fee for expedited processing.



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- 221 16. Agencies should take steps to redact any information that is protected by law or policy  
222 from public disclosure before providing public access to transcripts and recordings.  
223 17. Agencies should ensure that transcripts and recordings of open proceedings are available  
224 for public inspection in a timely manner.