Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation for Committee | November 12, 2021

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

Agencies must determine whether and how to allow public access to the proceedings they conduct. The Constitution and federal statutes establish the basic parameters for that determination. The Supreme Court has interpreted the First Amendment to provide a general right of public access to judicial proceedings, and a number of federal courts have held that the same right extends to at least some proceedings conducted by administrative agencies. Federal statutes, such as the Government in the Sunshine Act and certain statutes specific to particular programs and agencies, require that agencies open or close certain adjudicative proceedings to public observation. Agencies may need to transcribe or record certain adjudicative proceedings.

and may be required, under the Federal Advisory Committee Act or other laws, to make such
records publicly available. Conversely, the Freedom of Information Act, the Privacy Act, and
other laws and executive-branch policies may require agencies to protect sensitive interests and
information.

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

There can, however, be drawbacks to opening adjudicative proceedings to the public.
Many adjudications involve sensitive information that would be publicly disclosed in an open
proceeding. Public disclosure of unverified information or unproven allegations may result in
unwarranted reputational harm to private parties. Just as open proceedings allow family members
and other supportive members of the public to accompany participants, they also allow those
who would intimidate or harass. Openness may also affect the dynamic of agency proceedings,
leaving them vulnerable to disruption or leading them to become unduly adversarial or
protracted. There can also be administrative costs associated with facilitating in-person or remote

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4 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).

5 Id. § 552.

6 Id. § 552a.

7 See Graboyes & Thomson, supra note 2.
observation of adjudicative proceedings by members of the public, providing advance public notice of open proceedings, and providing access to transcripts and recordings of open proceedings. These costs may be warranted in some circumstances but not others.

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

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

1. Agencies should promulgate and publish procedural regulations governing public access to their adjudicative proceedings in the Federal Register and codify them in the Code of Federal Regulations. In formulating these regulations, agencies should be attentive to adhere to any constitutional or statutory requirements for public access and consider the benefits of public access and countervailing interests, such as privacy and confidentiality, as elaborated below. These regulations should, as spelled out in detail below, include the following:
   a. A list of proceedings that should be categorically or presumptively open or closed, and standards for determining when adjudicators may or must depart from such presumption in individual cases (see Paragraphs 4–6);
   b. The manners in which members of the public can observe open proceedings, for example by attending in person (e.g., at an agency office) or by remote means (e.g., online or by telephone) (see Paragraphs 7–9);
   c. Requirements, if any, for advance public notice of proceedings (see Paragraphs

Commented [A1]: For Committee review: Should this be "proceedings" or "open proceedings"? (Note: The Sunshine Act requires advance notice of closed meetings.)
2. In conjunction with such regulations, agencies should develop guidelines that set forth, in plain language:
   a. Where and how agencies will communicate the schedule of open proceedings to the public;
   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 and information on how they should do so;
   d. Whom members of the public should contact if they have questions about observing open proceedings;
   e. Instructions for accessing agency or non-agency facilities at which members of the public can observe open proceedings;
   f. Any requirements for conduct by public observers at open proceedings (e.g., regarding the possession and use of electronic devices);
   g. Protocols for facilitating media coverage of open proceedings; and
   h. Policies for managing open proceedings that attract high levels of public interest.

3. Agencies should post the regulations described in Paragraph 1, the guidelines described in Paragraph 2, 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

4. 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 consistent with the First Amendment and other potential constitutional and statutory bases for requiring open proceedings, and only to the extent necessary to protect a compelling interest such as:

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a. National security;

b. Law enforcement interests;

c. Confidential business information;

d. Participants’ privacy;

e. The interests of Minors or juveniles;

f. Other categories of information protected by statute or regulation.

For In some 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... For such programs, agencies may presume that evidentiary hearings and appellate proceedings will be closed to public observation while retaining the ability to open these proceedings, in whole or in part, in particular cases or to particular individuals.

5. Agencies should consider whether types of adjudicative proceedings other than evidentiary hearings and appellate proceedings (e.g., prehearing conferences) that are typically closed should be open to public observation. In doing so, developing policies regarding public access to particular types of proceedings other than evidentiary hearings and appellate proceedings, agencies should adhere to the First Amendment, Due Process Clause, and other applicable constitutional or statutory provisions and consider, at a minimum, the following:

a. Whether the First Amendment, the due process clause, or other constitutional provisions require open or closed proceedings;

b. 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;

c. 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 sensitive business documents, information, participants’ privacy, the interests of minors and juveniles, and other similarly compelling interests, or categories of information protected by statute or regulation;

d. Whether proceedings of that type or the broader adjudication process of which the proceeding at issue is a part typically includes opportunities for public access;

e. Whether there is often public interest in observing proceedings of that type;

f. 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

g. Whether members of the public can easily inspect or obtain copies of transcripts, recordings, or summaries of proceedings of that type.

6. Agencies should consider or adopting processes for departing from or considering requests to depart from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in the procedural regulations described in Paragraph 1:

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 non-parties to a case can request access, for themselves or the general public, to proceedings that are presumptively closed to public observation;

c. How individuals can respond or object to requests regarding public access made in subparagraphs (a) or (b) of this paragraph;

d. Under what circumstances 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, to whom, and how, and to whom they may do so.
Manner of Public Observation of Open Adjudicative Proceedings

7. 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.

8. Agencies should, when it would serve the public interest, consider providing 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.

9. 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 with disabilities, people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted, and people who do not have or obtain access to electronic devices or private internet services necessary to observe proceedings remotely. Agencies should also consider 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

10. 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

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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.

11. 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.

12. 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 identifying information 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; and

and
e. COVID-19 protocols and disability accommodations.

13. 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

14. 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-its 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 that is no more than the actual cost of duplication; 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

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15. 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.

16. Agencies should ensure that transcripts and recordings of open proceedings are available for public inspection in a timely manner.

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