



Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation for Committee | 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 [investigatory hearings, prehearing and scheduling conferences, and settlement conferences.](#)
7 Members of the public—participants’ family and friends, media representatives, representatives
8 of non-governmental organizations, researchers, and others—may seek to observe adjudicative
9 proceedings for any number of reasons.

Commented [A1]: Comment from Jeff Lubbers (11/11/21): I would reorder this list to make it more chronological, such as "investigatory hearings, prehearing and scheduling conferences, settlement conferences, evidentiary hearings, and appellate arguments" [On this note I wonder if investigatory hearings are ever open.]

10 Agencies must determine whether and how to allow public access to the proceedings they
11 conduct. The Constitution and federal statutes establish the basic parameters for that
12 determination. The Supreme Court has interpreted the First Amendment to provide a general
13 right of public access to judicial proceedings,¹ and a number of federal courts have held that the
14 same right extends to at least some proceedings conducted by administrative agencies.² Federal
15 statutes, such as the Government in the Sunshine Act³ and certain statutes specific to particular
16 programs and agencies, require that agencies open or close certain [aspects of](#) adjudicative

Commented [A2]: Comment from Jeff Lubbers (11/11/21): It may not be the full proceeding that has to be open or closed, but an aspect of it.

Commented [A3R2]: As an alternative, ACUS staff suggests: “. . . require that agencies open or close adjudicative proceedings or certain portions thereof to public observation.”

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

² 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.).

³ 5 U.S.C. § 552b.



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17 proceedings to public observation. Agencies may need to transcribe or record certain
18 adjudicative proceedings and may be required, under the Federal Advisory Committee Act⁴ or
19 other laws, to make such records publicly available.⁵ Conversely, [the Freedom of Information](#)
20 [Act](#),⁶ the Privacy Act,⁷ and other laws and executive-branch policies may require agencies to
21 protect sensitive interests and information.

22 On top of these constitutional and statutory requirements, many agencies have adopted
23 their own policies regarding public access to adjudicative proceedings.⁸ Settling on a sound
24 policy for determining which proceedings should be open to public observation can require a
25 careful balancing of different, and sometimes conflicting, interests. Proceedings open to public
26 observation promote transparency, public accountability, and public understanding of agency
27 decision making. Openness encourages fair process for private parties and promotes accurate and
28 efficient decision making by subjecting arguments and evidence to public scrutiny. And many
29 participants, especially self-represented parties, people with disabilities, and children, benefit
30 from having a family member, friend, personal care attendant, case worker, or other supportive
31 member of the public present at their proceedings.

32 There can, however, be drawbacks to opening adjudicative proceedings to the public.
33 Many adjudications involve sensitive information that would be publicly disclosed in an open
34 proceeding. Public disclosure of unverified information or unproven allegations may result in
35 unwarranted reputational harm to private parties. Just as open proceedings allow family members
36 and other supportive members of the public to accompany participants, they also allow in those

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 [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).

⁶ *Id.* § 552.

⁷ *Id.* § 552a.

⁸ See Graboyes & Thomson, *supra* note 2.

Commented [A4]: Comment from Jeff Lubbers (11/11/21):
The mention of the FOIA here seems a little questionable since it is a disclosure statute and doesn't necessarily "require" non-release of documents.



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37 who would intimidate or harass. Openness may also affect the dynamic of agency proceedings,
38 leaving them vulnerable to disruption or leading them to become unduly adversarial or
39 protracted. There can also be administrative costs associated with facilitating in-person or remote
40 observation of adjudicative proceedings by members of the public, providing advance public
41 notice of open proceedings, and providing access to transcripts and recordings of open
42 proceedings. These costs may be warranted in some circumstances but 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 comply with all relevant constitutional and statutory
48 requirements for public access; recognize the benefits of public access for members of the
49 public, private parties, agencies, and other participants; and account for any countervailing
50 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 below. These regulations should, as spelled out in detail below, include the
57 following:
- 58 a. A list of proceedings that should be categorically or presumptively open or
59 closed, and standards for determining when adjudicators may or must depart from
60 such presumption in individual cases (see Paragraphs [45–67](#));
 - 61 b. The manners in which members of the public can observe open proceedings, for



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- 62 example by attending in person (e.g., at an agency hearing room) or by remote
63 means (e.g., online or by telephone) (see Paragraphs [78–914](#));
- 64 c. Requirements, if any, for advance public notice of proceedings (see Paragraphs
65 [1011–1314](#)); and
- 66 d. The public availability of and means of accessing transcripts and audio and video
67 recordings of proceedings (see Paragraphs [1415–1617](#)).
- 68 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in
69 plain language, [the following information for proceedings that are open to the public](#):
- 70 a. Where and how agencies will communicate the schedule of upcoming [open](#)
71 [proceedings to the public](#);
- 72 b. Where and how members of the public can observe open proceedings;
- 73 c. [Whether The registration process, if any, required for](#) members of the public [need](#)
74 [to register before attend observing open](#) proceedings and how they should do so;
- 75 d. Whom members of the public should contact if they have questions about
76 observing open proceedings;
- 77 e. Instructions for accessing agency or non-agency facilities [at which members of](#)
78 [the public can observe open proceedings where proceedings are held](#);
- 79 f. Any requirements for conduct by public observers [at open proceedings](#) (e.g.,
80 regarding the possession and use of electronic devices);
- 81 g. Protocols for facilitating media coverage [of open proceedings](#); [and](#)
- 82 h. Policies for managing [open](#) proceedings that attract high levels of public interest;
83 [and](#)
- 84 [i.3. Agencies should also consider Whether whether](#) presumptively closed proceedings may
85 be open to select members of the public, such as family members or caregivers, [and, if so,](#)
86 [develop guidelines for such situations that address, as relevant, the information in](#)
87 [Paragraph 2.](#)
- 88 [3.4.](#) Agencies should post the regulations described in Paragraph 1, the guidelines described
89 in Paragraph 2, and any other information about public access to adjudicative
90 proceedings, in an appropriate location on their websites.

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

91 4.5. Agencies should adopt the presumption that evidentiary hearings and appellate
92 proceedings (including oral arguments) are open to public observation and may be
93 closed, in whole or in part, only to the extent consistent with the First Amendment and
94 other potential constitutional and statutory bases for requiring open proceedings, and only
95 to the extent necessary to protect a compelling interest such as:

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

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

108 5.6. Agencies should consider whether types of adjudicative proceedings other than
109 evidentiary hearings and appellate proceedings that are typically closed (such as
110 investigatory hearings and prehearing conferences) should be open to public observation.
111 In doing so, agencies, in addition to adhering to any constitutional or statutory
112 requirements for public access, should consider, at a minimum, the following:

- 113 a. Whether public access would promote important policy objectives such as
114 transparency, fairness to parties, accurate and efficient development of records for
115 decisionmaking, or public participation;
- 116 b. Whether public access would impede important policy objectives such as



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- 117 encouraging candor, achieving consensus, deciding cases and resolving disputes
118 in an efficient manner, preventing intimidation or harassment of participants,
119 avoiding unwarranted reputational harm to participants, or protecting national
120 security, law enforcement, confidentiality of sensitive business information,
121 especially sensitive personal privacy interests, the interests of minors and
122 juveniles, and other similarly compelling interests;
- 123 c. Whether such proceedings or the broader adjudication process of which the
124 proceeding at issue is a part typically include opportunities for public access;
 - 125 d. Whether there is often public interest in observing such proceedings; and
 - 126 e. Whether matters to be discussed at such proceedings ordinarily involve issues of
127 broad public interest or the interests of persons beyond the parties.
- 128 6-7. Agencies should adopt processes for departing from or considering requests to depart
129 from a presumption of open or closed proceedings in particular cases. Agencies should
130 consider addressing the following topics in the procedural regulations described in
131 Paragraph 1:
- 132 a. How parties to a case can request that proceedings that are presumptively open to
133 public observation be closed or that proceedings that are presumptively closed to
134 public observation be open to particular individuals or the general public;
 - 135 b. How non-parties to a case can request access, for themselves or the general
136 public, to proceedings that are presumptively closed to public observation;
 - 137 c. How individuals can respond or object to requests regarding public access made
138 in subparagraphs (a) or (b);
 - 139 d. Under what circumstances adjudicators or other agency officials can, on their own
140 motion, close proceedings that are presumptively open to public observation or
141 open proceedings that are presumptively closed to public observation;
 - 142 e. Whether and how adjudicators or other agency officials must document and notify
143 participants about decisions regarding public access; and
 - 144 f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to
145 whom, and how they may do so.



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Manner of Public Observation of Open Adjudicative Proceedings

- 146 ~~7.8.~~ When adjudicators conduct open proceedings in public hearing rooms, members of the
147 public should have the opportunity to observe the proceedings from the rooms in which
148 they are conducted, subject to reasonable security protocols, resource and space
149 constraints, and concerns about disruptions.
- 150 ~~8.9.~~ ~~When agencies~~ Agencies should provide all or select members of the public the
151 opportunity to observe open adjudicative proceedings remotely. Agencies should provide
152 remote access in a way that is appropriate for a particular proceeding. such as by
153 providing a dial-in number to select members of the public on request or by livestreaming
154 audio or video of the proceedings to the general public online. ~~they~~ Agencies should
155 structure remote access in a way that avoids disruptions, such as by ensuring that public
156 observers cannot:
- 157 a. ~~ensuring that public observers who are not entitled to participate in proceedings~~
158 ~~can only observe them and cannot interact with participants or other observers by~~
159 ~~unmuting~~ Unmute themselves,
 - 160 b. ~~sharing~~ Share visual content or ~~annotating~~ annotate shared documents, or
 - 161 c. ~~using~~ Use chat or file sharing features common in internet-based
162 videoconferencing software.
- 163 ~~9.10.~~ Agencies should consider whether interested members of the public are likely to
164 encounter any barriers to accessing open adjudicative proceedings. Agencies should
165 consider, for example, whether any measures are needed to accommodate people with
166 disabilities, people for whom it may be difficult to make arrangements to travel to
167 locations where proceedings are conducted, and people who do not have access to
168 electronic devices or private internet services necessary to observe proceedings remotely.
169 Agencies should also consider whether security protocols at the facilities where
170 proceedings are conducted or other factors make in-person attendance difficult or
171 impractical.



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Advance Public Notice of Adjudicative Proceedings

172 ~~10.11.~~ Agencies should provide advance public notice of open adjudicative proceedings
173 and consider whether to provide advance public notice of proceedings that are not open to
174 public observation. Agencies that determine that advance public notice would be
175 beneficial should consider (a) the best places and publications for providing such notice,
176 (b) the information provided in the notice, and (c) the timing of the notice. Agencies that
177 regularly conduct open proceedings should also consider maintaining a schedule of and
178 information about upcoming proceedings in an appropriate location on their websites.

179 ~~11.12.~~ To determine the best places and publications for providing advance public notice
180 of adjudicative proceedings, agencies should consider their needs and available resources
181 and the individuals, communities, and organizations that are likely to be interested in or
182 affected by such proceedings. Places and publications where agencies might provide
183 public notice of proceedings include:

- 184 a. *The Federal Register*;
- 185 b. A press release, digest, newsletter, or blog post published by the agency;
- 186 c. An agency events calendar;
- 187 d. Social media;
- 188 e. A newspaper or other media outlet that members of the public who may be
189 interested in observing the proceeding are likely to monitor;
- 190 f. A physical location that potentially interested members of the public are likely to
191 see (e.g., a bulletin board at a jobsite or agency office);
- 192 g. An email sent to persons who have subscribed to a mailing list or otherwise opted
193 to receive updates about a particular adjudication; or
- 194 h. A communication sent directly to members of the public, communities, and
195 organizations who may be interested in observing the proceeding.

196 ~~12.13.~~ Agencies should include the following information in any public notice for an
197 open adjudicative proceeding, as applicable:

- 198 a. The name and docket number or other identifying information for the proceeding;



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- 199 b. The date and time of the proceeding;
- 200 c. The ways that members of the public can observe the proceeding, along with the
- 201 directions, if any, for registering or requesting access to the proceeding and, for
- 202 in-person observers, instructions for accessing the facility where the proceeding
- 203 will take place, including any security or public health protocols and disability
- 204 accommodations;
- 205 d. A brief summary of the proceeding's purpose; and
- 206 e. Contact information for a person who can answer questions about the proceeding.

207 13-14. Agencies should determine the appropriate timing for providing and updating
208 public notice of adjudicative proceedings given the nature of their programs and the
209 proceeding at issue. More advance notice may be warranted, for example, if significant
210 public interest in an open proceeding is likely and interested members of the public will
211 need to travel to observe it in person.

Public Access to Transcripts and Recordings of Adjudicative Proceedings

212 14-15. Consistent with applicable constitutional and statutory requirements and the
213 objectives identified in paragraph 1, agencies should consider how they make transcripts
214 and recordings of adjudicative proceedings available to interested members of the public.
215 To provide public access to such records, an agency might, for example:

- 216 a. Make transcripts and recordings available for public inspection in a reading room,
217 docket office, or other agency facility;
- 218 b. Post transcripts and recordings in an appropriate location on its website, for
219 example in an electronic docket system;
- 220 c. Make transcripts and recordings available for public inspection on another public
221 website not controlled by the agency, such as a public video sharing website, but
222 only after weighing the costs and benefits of doing so;
- 223 d. Provide, or arrange for court reporters working under contract with the
224 government to provide, copies of transcripts and recordings on request, at no cost
225 to the requestor or, for a fee that is no more than the actual cost of duplication,

Commented [A5]: For Committee consideration: Does Recommendation 2017-1, *Adjudication Materials on Agency Websites*, have a role here? (See also suggested footnote at line 35.)



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226 [though the agency may charge a reasonable, additional fee for expedited](#)
227 [processing.](#)

228 ~~e. Arrange for court reporters who transcribe or record proceedings under contract~~
229 ~~with the government to provide copies of such records on request, at no cost to the~~
230 ~~requestor or for a fee that is no more than the actual cost of duplication.~~

231 ~~15.16.~~ Agencies should take steps to redact any information that is protected by law or
232 policy from public disclosure before providing public access to transcripts and
233 recordings.

234 ~~16.17.~~ Agencies should ensure that transcripts and recordings of open proceedings are
235 available for public inspection in a timely manner.