



Administrative Conference Recommendation 2020-6

Agency Litigation Webpages

Adopted December 17, 2020

Federal agencies and their component units¹ participate in thousands of court cases every year. Most such cases result in “agency litigation materials,” which this Recommendation defines as including agencies’ publicly filed pleadings, briefs, and settlements, as well as court decisions, where such materials bear on agencies’ regulatory or enforcement activities.

Public access to agency litigation materials is desirable for at least two reasons. First, because agency litigation materials often clarify how the federal government interprets and aims to enforce federal law, they can help people understand their legal obligations. Second, public access to agency litigation materials promotes accountable and transparent government. Those two reasons distinguish agency litigation materials from litigation filings by private parties.

However valuable public access to agency litigation materials might be, federal law does little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of Information Act (FOIA) requires disclosure, and then only when members of the public specify the materials in which they are interested (and no FOIA exception applies).² In the same vein, the E-Government Act of 2002 requires federal courts to make their written opinions, including opinions in cases involving federal agencies, available on websites.³ But that requirement has not always made judicial opinions readily accessible to the public, partly because most courts’

¹ The term “component units” encompasses an agency’s sub-units, which are often identified under terms like “agency,” “bureau,” “administration,” “office,” “division,” or “service.” For example, the United States Fish and Wildlife Service is a component unit of the Department of the Interior, and the Office of Water is a component unit of the United States Environmental Protection Agency.

² See 5 U.S.C. § 552(a)(3).

³ See 44 U.S.C. § 3502(a).



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websites lack functions and features that would allow users to easily identify cases about specific topics or agencies.

The most comprehensive source of agency litigation materials is the federal courts' Public Access to Court Electronic Records (PACER) service, which provides the public with instantaneous access to virtually every document filed in every federal court. But PACER searches often cost money, and the costs can add up quickly, especially when users are uncertain about what cases or documents they are trying to find. PACER's limited search functionality also makes it difficult to find cases involving particular agencies, statutes, regulations, or types of agency action. For example, a person interested in identifying ongoing cases to which the United States Fish and Wildlife Service (FWS) is a party would have to search for a host of terms—including "United States Fish and Wildlife Service," "U.S. Fish and Wildlife Service," and the names of FWS's recent directors—just to come close to identifying all such cases. Even after conducting all those searches, the person would still have to scroll through and eliminate search results involving state fish-and-wildlife agencies and private citizens with the same names as FWS's recent directors. Similarly, were a person interested in finding cases about FWS's listing of species under the Endangered Species Act (ESA), PACER would not afford that person any way to filter search results to include only cases about ESA listings. The person's only option would be to open and review documents in potentially thousands of cases.

The cost and time involved in performing this type of research limit PACER's usefulness as a tool for locating and searching agency litigation materials. And although paid legal services, such as Westlaw and Lexis, have far greater search capabilities than PACER, their costs can dissuade many individuals and researchers.

Agency litigation webpages, by contrast, can be a convenient way for the public to examine agency litigation materials. For purposes of this Recommendation, an agency litigation webpage is a webpage on an agency's website that systematically catalogs and links to agency litigation materials that may aid the public in understanding the agency's regulatory or enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation



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webpages, the public can visit them and quickly find important filings in court cases concerning matters of interest. Agency litigation webpages thus make it easier for the public to learn about the law and to hold government accountable for agencies' actions.

Several federal agencies already maintain agency litigation webpages.⁴ A survey of websites for twenty-five federal agencies revealed a range of practices regarding agency litigation webpages.⁵ The survey suggests that most federal agencies do not maintain active agency litigation webpages. Among those that do, the quality of the agency litigation webpages varies appreciably. Some contain vast troves of agency litigation materials; others contain much more limited collections. Some are updated regularly; others are updated only sporadically. Some are easy to locate and search; others are not. In short, there appears to be no standard practice for publishing and maintaining agency litigation webpages, save that all the surveyed agency litigation webpages contained only the publicly filed versions of agency litigation materials, with all confidential material—such as trade secrets and personally identifiable information—redacted.

An inspection of agencies' litigation webpages suggests four general features that make an agency litigation webpage useful. First, an agency's litigation webpage must be easy to find. Second, it must contain a representative and up-to-date collection of agency litigation materials. Third, those materials must be easy to search and sort. And fourth, the agency's litigation webpage must give visitors the information they need to understand the materials on the webpage, including information about materials the agency omitted from the webpage and the criteria the agency employed to determine which materials to include on the webpage.

⁴ See Mark Thomson, Report on Agency Litigation Webpages 14–16 (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/report-agency-litigation-webpages>.

⁵ See *id.* at 12–19 (identifying variations in agency practices). The survey conducted for this Recommendation covered all kinds of agencies—big and small, independent and not, regulatory and benefit-oriented, and so forth—with the aim of covering a broad and at least somewhat representative cross-section of federal agencies. In particular, the survey focused on agencies that are frequently in federal court or that are parties to a significant number of high-profile cases.



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Agency litigation webpages can promote transparency and accountability. The Administrative Conference recognizes, however, that creating and maintaining a useful agency litigation webpage takes time, money, and effort. An agency's decision to launch an agency litigation webpage will necessarily be informed by considerations such as the agency's mission, litigation portfolio, existing technological capacity, budget, and the anticipated benefits—to the agency and the public—of creating an agency litigation webpage.⁶ Further, an agency's decisions about what content to include on an agency litigation webpage should be tailored to the agency's particular circumstances. An agency that litigates thousands of cases each year, for example, could choose to feature only a representative sample of agency litigation materials on its agency litigation webpage.

Similarly, an agency that litigates many repetitive, fact-based cases could reasonably choose to post documents from just a few representative cases instead of posting documents from all of its cases.⁷ And an agency that litigates many different types of cases, some of obviously greater interest to the public than others, might appropriately restrict the contents of its agency litigation webpage to agency litigation materials from the types of cases that are of greater public interest, particularly when the agency determines that the resources required to post more agency litigation materials can be better applied elsewhere.

Since the decision to create and maintain an agency litigation webpage involves balancing factors that will differ from agency to agency, this Recommendation should not be read to suggest that agency litigation webpages be created and maintained by all agencies, especially those that litigate thousands of cases each year. Nor should this Recommendation be read as dictating the precise contents or structure of agency litigation webpages. While

⁶ Most federal agencies do not have independent litigation authority but are represented in court by the Department of Justice (DOJ). In most cases, these agencies designate a DOJ liaison, who is then added as a recipient for all court filing notices, resulting in automatic access to all filings via PACER. This automatic access should enable implementation of this Recommendation by client agencies.

⁷ *Cf.* Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,040 (July 5, 2017) (“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 on their websites a representative sampling of actual cases and associated adjudication materials.”).



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encouraging the creation and maintenance of agency litigation webpages, the Administrative Conference recognizes that an agency's particular circumstances might ultimately militate against creating an agency litigation webpage or might support only the creation of a comparatively limited version.

At bottom, this Recommendation simply offers best practices and factors for agencies to consider in making their agency litigation materials available on their websites, should the agencies choose to do so. The Recommendation leaves the weighing and balancing of those factors to the sound discretion of individual agencies.

RECOMMENDATION

Providing Access to Agency Litigation Materials

1. Agencies should consider providing access on their websites to publicly filed pleadings, briefs, and settlements, as well as court decisions bearing on agencies' regulatory or enforcement activities (collectively "agency litigation materials").
2. Should an agency choose to post such material, an agency with a large volume of court litigation could decide not to post documents from every case. The agency might, for instance, post examples of filings from routine litigation and all or a portion of the filings from cases raising important or unusual questions.
3. In determining whether to provide access to agency litigation materials on their websites, and in determining which types of agency litigation materials to include on their websites, among the factors agencies should consider are the following:
 - a. The public's interest in having ready access to certain categories of the agency's litigation materials;
 - b. The extent to which providing access to agency litigation materials on the agency's website will advance the agency's mission;
 - c. The internal benefits of maintaining a webpage providing access to certain types of agency litigation materials;



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- d. The costs of creating and maintaining a webpage providing access to the types of agency litigation materials the agency sees fit to include;
 - e. The nature of the agency's litigation portfolio, including the quantity of litigation materials the agency generates each year;
 - f. The degree to which the agency's existing technological capacity can accommodate the creation and maintenance of a webpage providing access to certain types of agency litigation materials;
 - g. The availability and cost of other technological services that may more reliably and effectively give access to agency litigation material because of its scale or volume and the wide variety of issues and matters involved; and
 - h. The risk of disclosure or increased dissemination of confidential or sensitive information of private litigants.
4. In determining which agency litigation materials to include on their websites, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy or business interests implicated by the disclosure of agency litigation materials. Each agency should implement a protocol to ensure that, before a document is posted to the agency's litigation webpage, the document has been reviewed and determined not to contain confidential information, such as trade secrets and personal identifying information.
5. Agencies should disclose materials in a way that gives a full and accurate picture of their litigating positions. To provide proper context, agencies should:
- a. Use objective, clear, and publicly posted criteria to determine which agency litigation materials the agencies will publish on their websites;
 - b. Regularly review their websites to ensure the agency litigation materials posted there (especially court opinions) are complete and up-to-date, and consider including notations regarding when material on the webpage was last updated;
 - c. Provide appropriate context for agency litigation materials, at least when failure to do so might confuse or mislead the public;



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- d. Explain the types of litigation in which the agency is involved and other ways to search for any additional agency litigation materials not included on the agency's litigation webpage, as well as opposing counsel's litigation filings;
 - e. When resources permit, consider posting opposing parties' litigation filings when they are significant or important to understanding an issue;
 - f. Neither present litigation materials as a means of setting policy, nor use those materials to circumvent rulemaking processes;
 - g. Ensure that descriptions of agency litigation materials, if any, fairly reflect the litigation; and
 - h. Recognize that some types of agency litigation materials may be of greater significance than others.
6. Agencies that choose to post significant quantities of agency litigation materials on their websites should consider grouping together links to those materials on a single, dedicated webpage (an "agency litigation webpage"). If an agency is organized so that its component units have their own litigation portfolios, some or all of the component units may wish to have their own agency litigation webpages, or the agency may wish to maintain an agency litigation webpage compiling litigation materials from or relating to the agency's component units.

Making It Easy to Locate Agency Litigation Webpages

7. Agencies that post agency litigation materials on their websites should make sure that website users can easily locate those materials. Agencies can accomplish this goal by:
 - a. Displaying links to agency litigation webpages in readily visible locations on the homepage for the agency's website; and
 - b. Maintaining a search engine and a site map or index, or both, on the agency's homepage.
8. When an agency collects its component units' litigation materials on a single agency litigation webpage, those component units' websites should clearly note that fact and



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include links to the agency's litigation webpage. When an agency's component units maintain their own litigation webpages, the agency's website should clearly note that fact and include links to the component units' litigation webpages.

Making It Easy to Find Relevant Materials on Agency Litigation Webpages

9. Agencies and their component units should have substantial flexibility in organizing materials. Agencies should consider grouping together materials from the same and related cases on their agency litigation webpages. Agencies might, for example, consider providing a separate docket page for each case, with a link to the docket page on their agency litigation webpages. Agencies should also consider linking to the grouped-together materials when issuing press releases concerning a particular litigation.
10. Agencies should consider offering general and advanced search and filtering options within their agency litigation webpages. The search and filtering options could, for instance, allow users to sort, narrow, or filter searches according to criteria such as action or case type, date, topic, case number, party name, a relevant statute or regulation, or specific words and phrases, along with any other criteria the agency decides are especially useful given its litigation activities.