



OFFICE OF THE CHAIRMAN
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

STATEMENT OF PRINCIPLES FOR THE DISCLOSURE OF FEDERAL ADMINISTRATIVE MATERIALS

This Statement was prepared by the Office of the Chairman of the Administrative Conference of the United States (ACUS) based on recommendations adopted by the ACUS Assembly. The Statement was not adopted by the ACUS Assembly and does not necessarily reflect the views of ACUS (including its Council, committees, or members).

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Statement of Principles for the Disclosure of Federal Administrative Materials

INITIAL OFFICE OF THE CHAIRMAN DRAFT FOR REVIEW BY THE ASSEMBLY AT THE 77TH PLENARY SESSION

June 16, 2022

1 Various statutes govern which records agencies must proactively disclose, i.e., disclose to
2 the general public without having received a request to do so from a member of the public. The
3 Freedom of Information Act (FOIA),¹ the Federal Register Act,² the Federal Records Act,³ the
4 Administrative Procedure Act,⁴ and the E-Government Act of 2002⁵ require proactive disclosure
5 of certain records. In addition, some statutes require agencies to disclose certain records on
6 request.⁶ Other laws, including the Privacy Act, either require or authorize agencies to withhold
7 certain records from disclosure.⁷

8 The Administrative Conference of the United States (ACUS) has issued dozens of
9 recommendations pertaining to agencies' proactive disclosure of records that agencies generate
10 or receive while engaged in rulemaking, adjudication, licensing, investigation, or other
11 administrative processes, or that they generate during judicial review of agency rules and orders.
12 This Statement of Principles refers to these records as "administrative materials." Examples of
13 administrative materials include requests for information; advance notices of proposed
14 rulemaking; notices of proposed rulemaking; public comments; rules (i.e., procedural
15 regulations, substantive regulations, and guidance documents); adjudicative orders and opinions;
16 and court filings related to judicial review of a rule or order. Proactive disclosure of

¹ 5 U.S.C. § 552(a)(1)–(2).

² 44 U.S.C. § 1505.

³ *Id.* § 3102.

⁴ 5 U.S.C. § 553(b).

⁵ 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services).

⁶ 5 U.S.C. § 552(a)(1)–(2).

⁷ *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a.

17 administrative materials promotes transparency of agency processes, enhances efficiency by
18 reducing the need for members of the public to file requests for agency records and agencies to
19 respond to such requests, and promotes the legitimacy and accountability of agency decisions.

20 This Statement sets forth common principles and best practices derived from the dozens
21 of relevant ACUS recommendations.⁸ It is intended to help guide agencies' proactive disclosure
22 of administrative materials in the most equitable, effective, and efficient way possible for both
23 the public and agencies. It is focused exclusively on best practices under existing law.⁹ It will be
24 continuously updated as ACUS adopts new recommendations pertaining to agencies' proactive
25 disclosure of administrative materials.¹⁰

⁸ The Appendix lists these recommendations.

⁹ An ongoing ACUS project, *Disclosure of Agency Legal Materials*, contemplates possible amendments to the principal statutes (including FOIA and the Federal Register Act) governing the proactive disclosure or publication of administrative materials.

¹⁰ In addition to *Disclosure of Agency Legal Materials*, there are several other ongoing ACUS projects that may result in recommendations that, if adopted by the Assembly, will be incorporated into this Statement of Principles. Visit <https://www.acus.gov/research-projects> for a list of ongoing projects.

STATEMENT OF PRINCIPLES

Proactively Disclosing Administrative Materials on Agency Websites and in the *Federal Register*

- 26 1. Agencies should proactively disclose on their websites administrative materials that
27 affect the rights and interests of members of the public. These include, among other
28 materials:
- 29 a. Rules (i.e., procedural regulations, substantive regulations, and guidance
30 documents);
 - 31 b. Adjudicative opinions and orders;
 - 32 c. Descriptions of agencies' organization and functions;
 - 33 d. Solicitations of public feedback (e.g., advance notices of proposed rulemaking
34 (ANPRMs), requests for information (RFIs), notices of proposed rulemaking
35 (NPRMs));
 - 36 e. Materials that an agency considered during the course of a rulemaking (e.g.,
37 public comments, studies, advisory committee reports, transcripts, recordings of
38 meetings);
 - 39 f. Decisions and supporting materials (e.g., pleadings, motions, briefs) issued and
40 filed in adjudicative proceedings; and
 - 41 g. Publicly filed pleadings, briefs, and settlements, as well as court decisions bearing
42 on agencies' regulatory or enforcement activities.
- 43 2. In lieu of disclosing all administrative materials of a single type (e.g., all adjudicative
44 opinions, substantively identical comments submitted as part of a mass comment
45 campaign) on agency websites, agencies should, in certain circumstances, consider
46 disclosing a representative sample of these materials or a sample that is particularly well
47 reasoned. Disclosing samples of these materials may be especially appropriate when the
48 agency has generated or received a large number of them, they are individually of little
49 public interest, and they raise similar legal and factual issues.
- 50 3. Agencies should organize administrative materials on their websites to maximize the
51 probability that members of the public will find the information for which they are
52 looking. In addition to posting links to PDF versions of administrative materials on
53 agency websites, agencies should, as appropriate:

- 54 a. Create a webpage dedicated to a particular kind of administrative material (e.g., a
55 dedicated guidance documents webpage) and ensure that this dedicated page is
56 easily reachable from the agency’s homepage;
- 57 b. Index, tag, or place administrative materials in sortable tables;
- 58 c. Ensure that website search engines capture administrative materials; and
- 59 d. Ensure that related electronic docket pages that house administrative materials are
60 linked to one another.
- 61 4. Agencies should present rules (i.e., procedural regulations, substantive regulations, and
62 guidance documents), and adjudicative opinions and orders on agency websites in a way
63 that ensures the public can understand their context and legal effect by, among other
64 methods:
- 65 a. Including a publication date within these materials, as appropriate;
- 66 b. Clearly marking materials that are inoperative (i.e., no longer in effect) by, for
67 example, including a rescission date;
- 68 c. Explaining the legal effect of these materials, including whether they have legal
69 effect on members of the public, legal effect on the agency itself, or are purely
70 explanatory in nature;
- 71 d. Distinguishing between precedential and non-precedential materials; and
- 72 e. Including links within inoperative versions of these materials to any operative
73 versions, and links within operative versions to any inoperative versions.
- 74 5. Agencies should keep webpages and electronic dockets housing administrative materials
75 up to date. At a minimum, agencies should fix any broken links and include notations
76 indicating when the page or electronic docket was last updated.
- 77 6. Agencies should submit at least the following administrative materials for publication in
78 the *Federal Register* and, as appropriate, the *Code of Federal Regulations*, in addition to
79 proactively publishing them on agency websites:
- 80 a. Substantive and procedural regulations;
- 81 b. Generally applicable guidance documents;
- 82 c. Descriptions of the agency’s organization and functions;
- 83 d. Solicitations of public feedback (e.g., ANPRMs, RFIs, and NPRMs); and
- 84 e. Subsequent changes to the foregoing materials.

85 7. With respect to inoperative administrative materials, agencies should consider disclosing
86 those that have certain indicia of significance, including those that would be useful for
87 understanding changes in law or policy, that generated reliance interests while operative,
88 or that have received extensive media attention.

Illustrations

89 (With respect to Paragraph 2): For instance, with respect to adjudicative opinions and
90 orders, agencies may decide to disclose a subset of such opinions and orders that are
91 particularly well reasoned and clear or that provide needed policy clarifications. *See*
92 *Admin. Conf. of the U.S., Recommendation 2013-1, Improving Consistency in Social*
93 *Security Disability Adjudications*, ¶ 3. With respect to public comments received in
94 response to rulemakings, agencies may decide to disclose a single, representative
95 example of nearly identical comments received. *See Admin. Conf. of the U.S.,*
96 *Recommendation 2021-1, Managing Mass, Computer-Generated, and Falsely Attributed*
97 *Comments*, ¶ 3.

98 (With respect to Paragraphs 3 and 4): One particularly important application of these
99 principles is with respect to guidance documents on agency websites. ACUS has
100 recommended that agencies create webpages dedicated to guidance documents and that
101 these webpages contain a plain language explanation (sometimes known as “explainers”)
102 that explain that guidance documents lack the force of law for members of the public.
103 The combined effect of grouping guidance documents together into a single page, along
104 with the inclusion of a statement on this page that describes their legal effect, is to ensure
105 that members of the public can easily find relevant guidance documents and understand
106 their legal effect. *See Admin. Conf. of the U.S., Recommendation 2019-3, Public*
107 *Availability of Agency Guidance Documents*, ¶ 7; *Admin. Conf. of the U.S.,*
108 *Recommendation 2019-1, Agency Guidance Through Interpretive Rules*, ¶ 4; *Admin.*
109 *Conf. of the U.S., Recommendation 2017-5, Agency Guidance Through Policy*
110 *Statements*, ¶ 4.

Using Supplemental Methods to Proactively Disclose Administrative Materials to Members of the Public

- 111 8. Agencies should consider using supplemental methods to improve public access to and
112 awareness of proactively disclosed administrative materials. Possible approaches include:
- 113 a. Proactively bringing administrative materials to the attention of interested persons
114 who do not normally monitor the agency’s website or the agency’s *Federal*
115 *Register* entries for developments;
 - 116 b. Training agency employees to effectively disseminate administrative materials;
 - 117 c. Taking steps to overcome or minimize geographical, language, resource, or other
118 barriers to learning about or accessing administrative materials, including by
119 publishing administrative materials in languages other than English and in
120 locations frequented by underrepresented communities, such as immigration court
121 waiting rooms;
 - 122 d. Creating digests, indexes, and guides that synthesize administrative materials in
123 easy-to-understand ways;
 - 124 e. Disseminating administrative materials via social media channels, including
125 agency blogs;
 - 126 f. Disseminating administrative materials via email distribution lists;
 - 127 g. Issuing press releases to announce the availability of administrative materials;
 - 128 h. Publishing administrative materials in specialized publications read by interested
129 members of the public; and
 - 130 i. Distributing administrative materials during webinars and in-person meetings.
- 131 9. Agencies should consider the following factors, among others, in deciding whether to use
132 supplemental methods and which ones to use:
- 133 a. Whether there are members of the public who are likely affected by the
134 administrative material but do not normally follow the *Federal Register* or the
135 agency’s website;
 - 136 b. Whether the agency has adequate resources to undertake these activities; and
 - 137 c. Whether the specific supplemental methods the agency contemplates undertaking
138 are the most cost-effective ways, of all the supplemental methods the agency
139 could feasibly undertake, to reach the target audience.

140 10. With respect to copyrighted material that agencies have incorporated by reference into
141 regulations or intend to incorporate by reference into regulations, agencies should ensure
142 that the material is reasonably available to the public. Agencies should try to obtain
143 consent from the copyright holder to publish the copyrighted material. If the copyright
144 holder does not grant this consent, the agency should work with the copyright holder and,
145 through the use of technological solutions (e.g., publishing a read-only version of the
146 material), low-cost publication, or other appropriate means, promote the availability of
147 the materials while respecting the copyright owner’s interest in protecting its intellectual
148 property.

Illustration

149 (With respect to Paragraph 8): This principle is especially important in the rulemaking
150 context. By taking steps, beyond publication, to bring rulemaking materials to the
151 attention of all interested persons, the agency is maximizing the probability that it
152 receives useful input as part of the notice-and-comment process. *See, e.g.,* Admin. Conf.
153 of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*; Admin.
154 Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*.

Protecting Personally Identifiable Information, Trade Secrets, and Other Legally Protected Information Contained Within Agency Administrative Materials

- 155 11. Agencies should, in general, review administrative materials before proactively
156 disclosing them to determine if they contain personally identifiable information, trade
157 secrets, and other legally protected information. If they find such material they should, as
158 appropriate:
- 159 a. Redact the material;
 - 160 b. Present the material in aggregate or summarized form; or
 - 161 c. Place the material in a physical reading room.
- 162 12. Agencies should offer members of the public the opportunity to request that personal
163 information or trade secrets pertaining to themselves or a dependent appearing within a
164 publicly available administrative material be removed from public view. Upon such a
165 request, agencies should either remove the material or should promptly notify the
166 requestor that they have decided not to do so.

Illustration

167 (With respect to Paragraph 11): Two especially important applications of this principle
168 are with respect to (1) adjudication materials and (2) public submissions in response to an
169 NPRM. These records, which agencies often disclose in their publicly available
170 electronic adjudicative and rulemaking dockets respectively, sometimes contain
171 personally identifiable information, trade secrets, and other legally protected information.
172 Sometimes, agencies can protect this information from public disclosure by redacting it
173 from the record and disclosing the remainder of the record. However, this strategy may
174 not always be sufficient to protect legally protected information. In these situations,
175 agencies should consider posting a summary of the record, rather than the record itself,
176 along with a statement that explains why the record as a whole was not disclosed. *See*
177 *Admin. Conf. of the U.S., Recommendation 2020-2, Protected Materials in Public*
178 *Rulemaking Dockets*, ¶¶ 6–10; *Recommendation 2017-1, Adjudication Materials on*
179 *Agency Websites*, ¶ 1. Placing these records in a physical reading room rather than in an
180 online docket may be appropriate to protect copyrighted materials within the records. *See*
181 *Admin. Conf. of the U.S., Recommendation 2013-4, The Administrative Record in*
182 *Informal Rulemaking*, ¶ 2.

Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

- 183 13. Agencies should create written procedures that explain:
- 184 a. The kinds of administrative materials they proactively disclose to the public;
- 185 b. How agencies organize administrative materials on their websites;
- 186 c. The methods agencies use to disclose administrative materials to the public and an
- 187 any supplemental methods, such as those described in Paragraph 8, that agencies
- 188 use to improve public access to or awareness of proactively disclosed materials;
- 189 and
- 190 d. How agencies protect personally identifiable information, trade secrets, and other
- 191 legally protected information contained within administrative materials.
- 192 14. Agencies should seek public input on these procedures as they are formulating them.
- 193 After they have finalized these procedures, they should disclose them on their websites
- 194 and seek further public input on the extent to which these procedures have, in practice,
- 195 promoted the public availability of administrative materials.
- 196 15. Agencies should periodically review these procedures to assess their performance in
- 197 making administrative materials available and to identify opportunities for improvement.

Illustration

198 (With respect to Paragraph 13): One especially important application of this principle is

199 with respect to written procedures for the proactive disclosure of inoperative guidance

200 documents. Creating and adhering to written procedures for the proactive disclosure of

201 inoperative guidance documents can give the public important insights into how

202 agencies' positions have changed over time. This is because agency positions are often

203 announced in guidance documents that, although disclosed on agency websites, are not

204 always published in the *Federal Register*. When an agency removes such a document

205 from its website after the document becomes inoperative, it can be virtually impossible

206 for the public to track how an agency's position has changed over time. However, when

207 an agency has a written procedure that provides for maintaining certain inoperative

208 guidance documents on its website, it holds itself accountable to the public for ensuring

209 that those documents remain on its website. And when an agency adheres to these written

210 procedures, members of the public gain access to a rich history of agency decision

211 making, benefiting regulated entities, beneficiaries of regulations, and other members of
212 the public. *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of*
213 *Inoperative Agency Guidance Documents*, ¶ 1.

APPENDIX

Proactively Disclosing Administrative Materials on Agency Websites and in the *Federal Register*

214 Admin. Conf. of the U.S., Recommendations:

- 215 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶¶ 1–4
- 216 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶¶ 3–7
- 217 • 2020-6, *Agency Litigation Webpages*
- 218 • 2020-5, *Publication of Policies Governing Agency Adjudicators*
- 219 • 2020-3, *Agency Appellate Systems*, ¶ 19
- 220 • 2020-1, *Rules on Rulemakings*, ¶ 3
- 221 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 7–10
- 222 • 2019-1, *Agency Guidance Through Interpretive Rules*, ¶ 4
- 223 • 2018-7, *Public Engagement in Rulemaking*, ¶ 9
- 224 • 2018-6, *Improving Access to Regulations.gov’s Rulemaking Dockets*
- 225 • 2018-5, *Public Availability of Adjudication Rules*
- 226 • 2017-5, *Agency Guidance Through Policy Statements*, ¶ 7
- 227 • 2017-1, *Adjudication Materials on Agency Websites*
- 228 • 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*
- 229 • 2014-6, *Petitions for Rulemaking*, ¶ 14
- 230 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶¶ 7, 9
- 231 • 2014-3, *Guidance in the Rulemaking Process*, ¶ 8
- 232 • 2013-5, *Social Media in Rulemaking*
- 233 • 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 2
- 234 • 2013-1, *Improving Consistency in Social Security Disability Adjudications*, ¶ 3
- 235 • 2011-8, *Agency Innovations in E-Rulemaking*, ¶ 4
- 236 • 2011-2, *Rulemaking Comments*, ¶ 3
- 237 • 2011-1, *Legal Considerations in e-Rulemaking*, ¶¶ 4–5
- 238 • 82-2, *Resolving Disputes Under Federal Grant Programs*, ¶ 12
- 239 • 76-2, *Strengthening the Informational and Notice-Giving Functions of the Federal*
- 240 *Register*, ¶ 1
- 241 • 75-1, *Licensing Decisions of the Federal Banking Agencies*, ¶ 4
- 242 • 71-3, *Articulation of Agency Policies*

Using Supplemental Methods to Proactively Disclose Administrative Materials to Members of the Public

243 Admin. Conf. of the U.S., Recommendations:

- 244 • 2021-9, *Regulation of Representatives in Agency Adjudicative Proceedings*, ¶ 9
- 245 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶ 6
- 246 • 2021-6, *Public Access to Agency Adjudicative Proceedings*, ¶ 1
- 247 • 2021-3, *Early Input on Regulatory Alternatives*

- 248 • 2020-2, *Protected Materials in Public Rulemaking Dockets*, ¶ 2
- 249 • 2020-1, *Rules on Rulemakings*, ¶ 3
- 250 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶¶ 11–12
- 251 • 2018-7, *Public Engagement in Rulemaking*
- 252 • 2016-4, *Evidentiary Hearings Not Required by the APA*, ¶ 28
- 253 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶ 5
- 254 • 2013-5, *Social Media in Rulemaking*
- 255 • 2012-3, *Immigration Removal Adjudication*, ¶ 17
- 256 • 2011-5, *Incorporation by Reference*, ¶ 3

Protecting Personally Identifiable Information, Trade Secrets, and Other Legally Protected Information Contained Within Agency Administrative Materials

257 Admin. Conf. of the U.S., Recommendations:

- 258 • 2021-3, *Early Input on Regulatory Alternatives*, ¶ 6
- 259 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶¶ 8–
- 260 10
- 261 • 2020-6, *Agency Litigation Webpages*, ¶ 4
- 262 • 2020-2, *Protected Materials in Public Rulemaking Dockets*
- 263 • 2018-4, *Recusal Rules for Administrative Adjudicators*, ¶ 6
- 264 • 2017-7, *Regulatory Waivers and Exemptions*, ¶ 9
- 265 • 2017-1, *Adjudication Materials on Agency Websites*, ¶ 1
- 266 • 2013-1, *Improving Consistency in Social Security Disability Adjudications*, ¶ 3
- 267 • 2011-1, *Legal Considerations in e-Rulemaking*, ¶¶ 1–2
- 268 • 72-8, *Adverse Actions Against Federal Employees*, ¶ 7

Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

269 Admin. Conf. of the U.S. Recommendations:

- 270 • 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, ¶ 1
- 271 • 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, ¶ 11
- 272 • 2020-6, *Agency Litigation Webpages*, ¶ 5
- 273 • 2020-2, *Protected Materials in Public Rulemaking Dockets*, ¶¶ 1–2
- 274 • 2020-1, *Rules on Rulemakings*, ¶ 2
- 275 • 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*, ¶ 6
- 276 • 2019-3, *Public Availability of Agency Guidance Documents*, ¶ 1
- 277 • 2014-4, *Ex Parte Communications in Informal Rulemaking*, ¶¶ 1–3
- 278 • 2013-4, *The Administrative Record in Informal Rulemaking*, ¶¶ 10–11
- 279 • 93-3, *Peer Review in the Award of Discretionary Grants*, ¶ 4