



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).

Recommended Citation

Admin. Conf. of the U.S., Office of the Chairman, Statement of Principles for the Disclosure of Federal Administrative Materials (June 16, 2022).

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

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

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

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

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

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

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

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

Illustrations

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

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

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

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

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

Illustration

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

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

Illustration

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

Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

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

Illustration

(With respect to Paragraph 13): One especially important application of this principle is with respect to written procedures for the proactive disclosure of inoperative guidance documents. Creating and adhering to written procedures for the proactive disclosure of inoperative guidance documents can give the public important insights into how agencies' positions have changed over time. This is because agency positions are often announced in guidance documents that, although disclosed on agency websites, are not always published in the *Federal Register*. When an agency removes such a document from its website after the document becomes inoperative, it can be virtually impossible for the public to track how an agency's position has changed over time. However, when an agency has a written procedure that provides for maintaining certain inoperative guidance documents on its website, it holds itself accountable to the public for ensuring that those documents remain on its website. And when an agency adheres to these written procedures, members of the public gain access to a rich history of agency decision

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

APPENDIX

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

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

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

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

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

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

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

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

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

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

Creating Written Procedures with Respect to Proactively Disclosing Administrative Materials

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

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