



Agency Litigation Webpages

Committee on Judicial Review

Proposed Recommendation | December 17, 2020

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

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

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

10 However valuable public access to agency litigation materials might be, federal law does
11 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of
12 Information Act (FOIA) requires disclosure, and then only when members of the public specify
13 the materials in which they are interested (and no FOIA exception applies).² In the same vein, the

Commented [CA1]: Proposed Amendment from Council # 1. Explanation: The Council presumes that the inclusion of this comma reflects the Committee's intent and, in any event, believes this change should be made.

Commented [CA2]: Proposed Amendment from Council # 2

¹ The term “component units” encompasses an agency’s sub-units, which are often identified under terms like “agency,” “bureau,” “administration,” “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).



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14 E-Government Act of 2002 requires federal courts to make their written opinions, including
15 opinions in cases involving federal agencies, available on websites.³ But that requirement has not
16 always made judicial opinions readily accessible to the public, partly because most courts'
17 websites lack functions and features that would allow users to easily identify cases about specific
18 topics or agencies.

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

35 The cost and time involved in performing this type of research limit PACER's usefulness
36 as a tool for locating and searching agency litigation materials. And although paid legal services,

³ See 44 U.S.C. § 3502(a).



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37 such as Westlaw and Lexis, have far greater search capabilities than PACER, their costs can
38 dissuade many individuals and researchers.

39 Agency litigation webpages, by contrast, can be a convenient way for the public to
40 examine agency litigation materials. For purposes of this Recommendation, an agency litigation
41 webpage is a webpage on an agency's website that systematically catalogs and links to agency
42 litigation materials that may aid the public in understanding the agency's regulatory or
43 enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation
44 webpages, the public can visit them and quickly find important filings in court cases concerning
45 matters of interest. Agency litigation webpages thus make it easier for the public to learn about
46 the law and to hold government accountable for agencies' actions.

47 Several federal agencies already maintain agency litigation webpages.⁴ A survey of
48 websites for 25 twenty-five federal agencies of all stripes revealed a range of practices regarding
49 agency litigation webpages.⁵ The survey suggests that most federal agencies do not maintain
50 active agency litigation webpages. Among those that do, the quality of the agency litigation
51 webpages varies appreciably. Some contain vast troves of agency litigation materials; others
52 contain much more limited collections. Some are updated regularly; others are updated only
53 sporadically. Some are easy to locate and search; others are not. In short, there appears to be no
54 standard practice for publishing and maintaining agency litigation webpages, save that all the
55 surveyed agency litigation webpages contained only the publicly filed versions of agency

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-112420>.

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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56 litigation materials, with all confidential material—such as trade secrets and personal^{ly}
57 identifiable^{ing} information—redacted.

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

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

75 Similarly, an agency that litigates many repetitive, fact-based cases could reasonably
76 choose to post documents from just a few ^{example representative} cases instead of posting
77 documents from all of its cases.⁶ And an agency that litigates many different types of cases, some

⁶ Cf. ^{Administrative Conference of the United States}, 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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78 of obviously greater interest to the public than others, might appropriately restrict the contents of
79 its agency litigation webpage to agency litigation materials from the types of cases that are of
80 greater public interest, particularly when the agency determines that the resources required to
81 post more agency litigation materials can be better applied elsewhere.

82 Since the decision to create and maintain an agency litigation webpage involves
83 balancing factors that will differ from agency to agency, this Recommendation should not be
84 read to suggest that agency litigation webpages be created and maintained by all agencies,
85 especially those that litigate thousands of cases each year. Nor should this Recommendation be
86 read as dictating the precise contents or structure of agency litigation webpages. While
87 encouraging the creation and maintenance of agency litigation webpages, the Administrative
88 Conference recognizes that an agency's **particular unique** circumstances might ultimately militate
89 against creating an agency litigation webpage or might support only the creation of a
90 comparatively limited **agency litigation webpage version**.

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

95 Most federal agencies do not have independent litigation authority, but are represented in
96 court by the Department of Justice (DOJ). Under current practice, in most cases, agencies
97 designate a liaison with DOJ, and that person is added as a recipient of court filings. As a result,
98 the client agency has automatic access to all filings made through the Case
99 Management/Electronic Case Files (CM/ECF) system (also known as PACER). In that way,
100 client agencies should have full access to court filings made by DOJ on their behalf and be able
101 to implement this Recommendation.

Commented [CMA3]: Proposed Amendment from Senior Fellow Alan B. Morrison



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RECOMMENDATION

Providing Access to Agency Litigation Materials

- 102 1. Agencies should ~~consider providing~~ access on their websites to publicly filed pleadings,
103 briefs, and settlements, as well as court decisions bearing on agencies’ regulatory or
104 enforcement activities (collectively “agency litigation materials”). In doing so, agencies
105 should recognize that some types of agency litigation materials, such as court opinions,
106 may be of greater significance than others, such as pleadings.
- 107 2. Should an agency choose to post such material, an agency with a large volume of court
108 litigation could decide not to post documents from every case. The agency might, for
109 instance, post examples of filings from routine litigation and all or a portion of the filings
110 from cases raising important or unusual questions.
- 111 3. In determining whether to provide access to agency litigation materials on their websites,
112 and in determining which types of agency litigation materials to include on their
113 websites, among the factors agencies should consider are the following:
- 114 a. The internal benefits of maintaining a webpage providing access to certain types
115 of agency litigation materials;
 - 116 b. The public’s interest in having ready access to certain categories of the agency’s
117 litigation materials;
 - 118 c. The availability and cost of other technological services that may more reliably
119 and effectively give access to agency litigation material because of its scale or
120 volume and the wide variety of issues and matters involved;
 - 121 d. The extent to which providing access to agency litigation materials on the
122 agency’s website will advance the agency’s mission;
 - 123 e. The costs of creating and maintaining a webpage providing access to the types of
124 agency litigation materials the agency sees fit to include;

Commented [CMA4]: Proposed Amendment from Public Member Emily S. Bremer

Commented [CA5]: Proposed Amendment from Council # 3

Commented [CMA6]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers: I suggest a reordering of the subparts as follows: (d), (a), (e), (b), (f), (g), (c), (h).



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- 125 f. The nature of the agency’s litigation portfolio, including the quantity of litigation
126 materials the agency generates each year;
- 127 g. The degree to which the agency’s existing technological capacity can
128 accommodate the creation and maintenance of a webpage providing access to
129 certain types of agency litigation materials; and
- 130 h. The risk of disclosure or ~~wide-increased~~ dissemination of confidential or sensitive
131 information of private litigants.
- 132 4. In determining which agency litigation materials to include on their websites, agencies
133 should ensure that they have implemented appropriate safeguards to protect relevant
134 privacy ~~and of~~ business interests implicated by the disclosure of agency litigation
135 materials. Each agency should implement a protocol to ensure that, before a document is
136 posted to the agency’s litigation webpage, the document has been reviewed and
137 determined not to contain confidential information, such as trade secrets and personal
138 identifying information.
- 139 5. Agencies should disclose materials in a way that gives a full and accurate picture of their
140 litigating positions. To provide proper context, agencies should:
- 141 a. Use objective, clear, and publicly posted criteria to determine which agency
142 litigation materials the agencies will publish on their websites;
- 143 b. Regularly review their websites to ensure the agency litigation materials posted
144 there (especially court opinions) are complete and up-to-date, and consider
145 including notations regarding when material on the webpage was last updated;
- 146 c. Provide appropriate context for agency litigation materials, at least when failure to
147 do so might confuse or mislead the public;
- 148 d. Explain the types of litigation in which the agency is involved and other ways to
149 search for any additional agency litigation materials not included on the agency’s
150 litigation webpage, as well as opposing counsel’s litigation filings;



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- 151 e. When resources permit, consider posting opposing parties' litigation filings when
152 they are significant or important to understanding an issue;
- 153 f. Neither present litigation materials as a means of setting policy, nor use those
154 materials to circumvent rulemaking processes; and
- 155 g. Ensure that descriptions of agency litigation materials, if any, fairly reflect the
156 litigation.
- 157 6. Agencies that choose to post significant quantities of agency litigation materials on their
158 websites should consider grouping together links to those materials on a single, dedicated
159 webpage (an "agency litigation webpage"). If an agency is organized so that its
160 component units have their own litigation portfolios, some or all of the component units
161 may wish to have their own agency litigation webpages, or the agency may wish to
162 maintain an agency litigation webpage compiling litigation materials from or relating to
163 the agency's component units.

Making It Easy to Locate Agency Litigation Webpages

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

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Making It Easy to Find Relevant Materials on Agency Litigation Webpages

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