



## Agency Information Dissemination in the Internet Era

### Committee on Administration and Management

#### Proposed Recommendation | November 2, 2015

1 To carry out their missions, many federal agencies are authorized and even required by  
2 statute to issue public statements. Agencies have to maintain a delicate balance when publicly  
3 disseminating information. On the one hand, active or passive communication of information  
4 by agencies to provide members of the public alerts or data concerning dangers to health,  
5 safety, or significant economic harm is essential to protecting society's interests and must be  
6 timely to be effective. Information dissemination by agencies also advances the public interest  
7 by encouraging public participation in government, fostering innovation, and enabling  
8 consumers to make more informed decisions.

9 On the other hand, it has long been recognized that if not conducted under appropriate  
10 processes, agency information dissemination has the potential to cause unfair injury to persons  
11 or entities that are the subject of the disclosure.<sup>1</sup> In 1973, responding to several incidents in  
12 which agency press publicity caused significant harm to private parties, the Administrative  
13 Conference issued Recommendation 73-1, "Adverse Agency Publicity."<sup>2</sup> Recommendation 73-1  
14 defined "adverse agency publicity" as "statements made by an agency or its personnel which  
15 invite public attention to an agency's action or policy and which may adversely affect persons  
16 identified therein."<sup>3</sup> Recognizing that adverse agency publicity is undesirable when it is  
17 "erroneous, misleading or excessive or it serves no authorized agency purpose," the Conference

**Commented [SM1]:** These two sentences seem to still equate public statements with information dissemination. Given the changes made in the rest of the paper I would change the first sentence to end with "publish information"

**Commented [SM2]:** Given the emphasis made during the meeting on including a fuller discussion of the benefits of disseminating health and safety information, I expected more about the importance/necessity of publishing timely information related to health or safety concern, even when that information is incomplete or uncertain.

Either here or elsewhere a more detailed discussion should be added that notes some of the most obvious reasons that information should be released even when it may not be certain or complete. Examples of public safety warnings which needed to be narrowed or clarified later are a good example. The paper should clearly state that ACUS is not suggesting that agencies refrain from disclosing information necessary to protect public health or safety, even if that information is incomplete or uncertain.

<sup>1</sup> See Circular No. A-130, Memorandum for Heads of Executive Departments and Agencies, Management of Information Resources (Nov. 28, 2000). On October 22, 2015, the Office of Management and Budget announced a public comment process to promulgate revisions to Circular No. A-130 to take into account new statutory requirements and enhanced technological capabilities. See Request for Comments on Circular No. A-130, Managing Information as a Strategic Resource, 80 Fed. Reg. 6,4022 (Oct. 22, 2015).

<sup>2</sup> See Administrative Conference of the United States, Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16,839 (Jun. 27, 1973) [hereinafter Recommendation 73-1].

<sup>3</sup> In Recommendation 73-1, the Conference distinguished such publicity "from the mere decision to make records available to the public rather than preserve their confidentiality," as the latter is governed by the Freedom of Information Act (FOIA).



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18 recommended that agencies adopt rules containing minimum standards and structured  
19 practices governing the issuance of publicity. Some agencies implemented Recommendation  
20 73-1 by adopting such rules; other agencies responded to the spirit of the Recommendation by  
21 adopting less formal internal policies to address these issues; and still other agencies took no  
22 action.

23 When Recommendation 73-1 was issued, traditional forms of publicity, such as the  
24 press release, were one of the primary vehicles for agencies to communicate with the public.  
25 Subsequent technological developments have led to reductions in the cost and great increases  
26 in the speed of agencies' collection, storage, and communication of information, including the  
27 predominance of Internet-based communications, expansion of the Internet, the emergence of  
28 social media,<sup>4</sup> and the proliferation of searchable online databases capable of storing large  
29 amounts of information.<sup>5</sup> In addition, in recent years, "open government," "open data," and  
30 "smart disclosure" initiatives have encouraged agencies to disclose information to the public to  
31 enhance government transparency, increase public engagement, and help consumers make  
32 smarter choices in the marketplace.<sup>6</sup>

33 In light of these developments, the Conference commissioned a report to study modern  
34 agency practices for dissemination of information, identify new challenges, and advise how  
35 Recommendation 73-1 might be updated.<sup>7</sup> The report found that the way in which agencies  
36 communicate with the public has evolved. The most salient agency communications are still

**Commented [SM3]:** Many of the policies did more than encourage disclosure, they required it. To use the term encourage makes it seem that the agency actions are voluntary and potentially unauthorized.

<sup>4</sup> This recommendation adopts the definition of "social media" in Recommendation 2013-5, which "broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public." Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 242 (Dec. 17, 2013).

<sup>5</sup> Capital markets, powered by the Internet, are now able respond more quickly to information disseminated by agencies, increasing the risk that share value will be significantly affected by such information, without regard to whether the contents of an initial communication are accurate or interpreted correctly.

<sup>6</sup> See, e.g., Presidential Documents, Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,683, 4,685 (Jan. 21, 2009); OMB Memorandum M-13-13, Open Data Policy—Managing Information as an Asset (May 9, 2013); Executive Office of the President, Smart Disclosure and Consumer Decision Making: Report of the Task Force on Smart Disclosure (May 30, 2013).

<sup>7</sup> See Nathan Cortez, Agency Publicity in the Internet Era 1 (September 25, 2015) (Report to the Administrative Conference of the United States) [hereinafter Cortez Report], <https://www.acus.gov/sites/default/files/documents/agency-publicity-in-the-internet-era.pdf>.



37 usually accompanied by targeted agency press releases and more traditional announcements.  
38 But agencies also release vast amounts of information to the public without specifically calling  
39 attention to it. Some agencies have also established large online databases on their websites  
40 through which they passively publish information about private parties to individuals, groups,  
41 and organizations that seek out such information and data.

**Commented [SM4]:** There was discussion at the last meeting about targeted versus untargeted disclosures. This line notes that targeted communications (those that seek to specifically highlight particular entities) are the most important types of communications for this issue. Yet almost none of the rest of the paper makes the distinction and there is no distinction in the recommendations.

42 As a result, this recommendation, in contrast to Recommendation 73-1, addresses  
43 information dissemination by agencies more broadly, rather than focusing on “adverse agency  
44 publicity” that specifically invites public attention to agency action or policy. As used in this  
45 recommendation, the term “information dissemination” covers agency disclosure of  
46 information to the public that may affect persons identified in the disclosure, including  
47 information that is collected by agencies and released to the public through online searchable  
48 databases.<sup>8</sup> Although the scope of this recommendation is broader than Recommendation 73-  
49 1, the goal remains the same: to encourage agencies to adopt, as practicable, policies and  
50 practices that minimize the risk of releasing information to the public that is erroneous,  
51 misleading, excessive, or serves no authorized agency purpose. This recommendation  
52 therefore builds upon and supplements the 1973 Recommendation.

**Commented [SM5]:** What does excessive mean in this context? I would cut it if it can't be defined.

### 53 **Challenges of Modern Agency Information Dissemination**

54 The report commissioned by the Conference found that modern forms of information  
55 dissemination have created new policy and management challenges for agencies.<sup>9</sup> Most social  
56 media, for instance, are designed to disseminate information that can be accessed quickly and  
57 shared widely, increasing the risk that at least some important facts or nuances will be lost in  
58 the course of disseminating the information. Social media can also create logistical hurdles for  
59 agencies, by making it more difficult to control the distribution and content of information.

<sup>8</sup> “Information dissemination” does not include distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act. This limitation accords with that in Circular A-130.

<sup>9</sup> See generally Cortez Report, *supra* note 7.



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60 Online searchable databases present unique challenges for agencies because different  
61 agency databases are populated with different kinds of data, obtained from different sources,  
62 and subject to different quality controls. Such databases may also serve very different  
63 purposes. Some databases include data reported by regulated parties, whereas others include  
64 data generated by agencies as part of their regulatory enforcement responsibilities, while yet  
65 others include data reported by third parties. The quality and reliability of the information  
66 collected and made publicly available by the agency may thus vary depending on the nature of  
67 the database. This phenomenon requires the adoption of different standards and processes to  
68 protect the various public and private interests potentially affected by the information set forth  
69 in a particular database. In sum, a one-size-fits-all approach is not feasible, given the variety of  
70 searchable online databases.

71 Agency policies governing dissemination of information from database disclosures can  
72 be required and/or informed by congressional directives,<sup>10</sup> by the experience of other agencies,  
73 and by guidance issued in connection with “open government,” “open data,” and “smart  
74 disclosure” initiatives. For instance, the Open Data Policy directive issued by the Office of  
75 Management and Budget (OMB) directs agencies to ensure that “open data”—publicly  
76 available data structured in a way that enables the data to be fully discoverable and usable by  
77 end users—is “described fully so that consumers of the data have sufficient information to  
78 understand their strengths, weaknesses, analytical limitations, security requirements, as well as  
79 how to process them.”<sup>11</sup> This and the other standards in the directive are consistent with  
80 reconciling the principles of ensuring that the public has broad access to information, while at  
81 the same time protecting private parties specifically identified in the information.

82 For more concrete examples of procedures and best practices that may be used to  
83 ensure the quality of information disseminated through online databases, agencies can look to

<sup>10</sup> See Cortez Report, at 20-21 for a discussion of the Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 (codified in various sections of 15 U.S.C.), which requires the Consumer Product Safety Commission (CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer products, and provides various procedural protections to regulated parties.

<sup>11</sup> OMB Memorandum M-13-13, *supra* note 6.

**Commented [SM6]:** This is an important point and does not just apply to databases. The point should be moved or repeated elsewhere to make it clear that depending on the work and information of different components and programs, different policies to oversee disclosure may be needed.



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84 the experience of other agencies. For instance, the Consumer Financial Protection Bureau  
85 (CFPB) publishes a database that allows consumers to submit complaints for various financial  
86 products.<sup>12</sup> The agency describes its procedures for publishing complaints in policy statements  
87 published in the Federal Register.<sup>13</sup> When the CFPB receives a consumer complaint, it  
88 authenticates the complaint to confirm a commercial relationship existed between the  
89 consumer and the company, and forwards the complaint to the company, which can then  
90 respond with pre-set, “structured” responses. For a complaint narrative to be published, the  
91 consumer must give consent, and personal information must be removed from the complaint.  
92 The agency does not publish complaints that: (1) lack critical information, (2) have been  
93 referred to other agencies, (3) are duplicative, (4) would reveal trade secrets, (5) are  
94 fraudulently submitted, or (6) incorrectly identify the regulated entity. The database also  
95 explicitly informs the user that the agency does not verify all of the facts alleged in complaints.  
96 These procedures, described in more detail in the report commissioned by the Conference, can  
97 provide a useful body of experience that may be helpful to other agencies that are considering  
98 establishing policies for information dissemination from similar databases.<sup>14</sup>

99 More generally, the Information Quality Act (IQA) can also provide a useful framework  
100 for ensuring that information disseminated by agencies is not erroneous, misleading, excessive,  
101 or serves no authorized agency purpose.<sup>15</sup> Enacted in 2001, the IQA requires OMB to issue  
102 government-wide guidelines to ensure the quality, objectivity, utility, and integrity of  
103 information disclosed by agencies. The OMB guidelines implementing the IQA require agencies  
104 to issue their own guidelines to ensure the quality of information they disseminate, as well as  
105 to “establish administrative mechanisms allowing affected persons to seek and obtain, where  
106 appropriate, timely correction of information maintained and disseminated by the agency that

**Commented [SM7]:** The paper starts talking about general disclosure and even targeted disclosure but then shifts quickly into discussion about databases. Now this section on IQA seems to swing back to non-database and even targeted disclosure (though it doesn't use that term) of press releases. I would suggest moving this discussion (lines 99 – 118) up to before the database discussion (right after line 52)

<sup>12</sup> See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaint/>.

<sup>13</sup> See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (Jun. 22, 2012).

<sup>14</sup> See Cortez Report, *supra* note 7 at 62-71.

<sup>15</sup> See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516.



107 does not comply with OMB or agency guidelines.”<sup>16</sup> ~~Many~~ Most agencies have created  
108 procedures for requesting correction of agency-disseminated information.

109 The OMB guidelines, however, exempt press releases from the scope of its  
110 requirements.<sup>17</sup> Nevertheless, OMB has appeared to support individual agency guidelines that  
111 narrow the exemption for press releases.<sup>18</sup> In developing their own guidelines to implement  
112 the IQA, ~~agencies~~ they have taken different approaches with respect to the press release  
113 exemption.<sup>19</sup> Some agencies have narrowed that exemption to provide that the IQA applies to  
114 new substantive information in press releases not covered by previous information  
115 dissemination subject to the IQA; others have adopted a broad exemption for press releases.  
116 Still others have not addressed the issue at all. OMB’s clarification of the scope of the press  
117 release exemption to the IQA could provide a measure of predictability in an area that remains  
118 murky.

119 In light of these challenges, and given the overarching goal of balancing public and  
120 private interests, the Conference recommends that agencies adopt the following policies and  
121 best practices.

**RECOMMENDATION**

- 122 1. *Written policies.* Agencies that routinely engage in information dissemination that  
123 identifies individuals or private parties should adopt written policies, if they do not  
124 already have them, addressing the content and procedures for information  
125 dissemination. These need not be a single set of agency-wide policies as different  
126 programs, divisions, etc. may have different information and process needs.

<sup>16</sup> 67 Fed. Reg. 8,452, 8,460 (Feb. 22, 2002).

<sup>17</sup> *Id.* The guidelines also exempt opinions and adjudicative processes, but those exemptions are beyond the scope of this recommendation.

<sup>18</sup> See Memorandum for President’s Management Council, Agency Draft Information Quality Guidelines, from John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), OMB (June 10, 2002).

<sup>19</sup> See Cortez Report, *supra* note 7, Appendix G.

**Commented [SM8]:** Only a small number of agencies didn’t produce IQA guidelines.

**Commented [SM9]:** The IQA policies by agencies went beyond just a process to request corrections. These were guidelines on maintaining the data quality for information disseminated by an agency.

We also discussed that subsequent policies – the Open Data Memo I believe, extended some of the IQA responsibilities to databases. I think that should be pointed out.

I also think it should be noted that for some (if not many) agencies, their IQA guidelines may suffice to fulfill these recommendations. If ACUS doesn’t believe these public policies are sufficient, then that the paper should offer some explanation of the deficiencies of those IQA policies.



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- 127 a. These policies should include clear internal lines of responsibility for publishing  
128 information, and safeguards to ensure ~~accuracy~~quality and integrity, ~~if~~  
129 ~~information is presented as accurate by the agency.~~
- 130 b. These policies should extend to social media and other forms of Internet-based  
131 information dissemination.
- 132 2. *Database disclosures.* Agencies that create and maintain online databases should adopt  
133 written policies governing dissemination of information through their databases. Those  
134 policies should include the following best practices:
- 135 a. Agencies should ensure that users are informed of the source(s), context,  
136 procedures taken to ensure data quality, and any limitations ~~on the accuracy~~ of  
137 the ~~information contained in the~~ database, including whether the information  
138 has been verified or authenticated by the agency.
- 139 b. Agencies should ensure that subjects identified in the database are given the  
140 opportunity to post responses or request corrections or retractions, as  
141 practicable and subject to reasonable exceptions in the public interest.
- 142 3. *Publication of policies.* Agencies should publish online their information dissemination  
143 policies.
- 144 4. *Employee training.* Agencies should provide their employees with training on their  
145 information dissemination policies.
- 146 5. *Advanced notice.* Where practicable, consistent with the nature of the information to  
147 be disseminated, and reasonable under the circumstances, agencies should give  
148 advance notice to subjects identified in the agencies' dissemination of information.
- 149 6. *Publicizing investigations and other preliminary actions.* Agencies should not publicize  
150 preliminary investigations directed at a member of the public or a regulated entity as to



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151 which the agency has not reached a formal internal conclusion or taken a public action,  
152 except where required by statute or in circumstances supported by the public interest.

153 7. *Publicly disclosing legal complaints and agency adjudicatory proceedings.* If agencies  
154 publicize legal complaints or the commencement of an adjudicatory proceeding, when  
155 practicable, they should do so only with a clear explanation that the allegations have not  
156 been adjudicated and may be disputed.

157 8. *Clarifying the Information Quality Act as to Press Releases.* OMB should consider  
158 clarifying whether the Information Quality Act applies to new, substantive information  
159 in press releases that has not been previously disseminated by the agency.

160 9. *Objections, corrections, and retractions.* Agencies that routinely engage in information  
161 dissemination that identifies individuals or private parties but have not produced  
162 subject to the Information Quality Act guidelines should adopt procedures for accepting  
163 and responding to objections to information disseminated by the agency, and for  
164 correcting and retracting materially inaccurate statements, subject to exceptions in the  
165 public interest. Agencies should furnish the public with a designated point of contact  
166 within the agency for submission of objections.

**Commented [SM10]:** I'm not clear on what justifies giving investigations its own special recommendation? The paper doesn't include any earlier discussion of them -- like is done for databases -- making the case that they are special or reside in some policy niche that needs to be addressed.

I would think that the first recommendation on written policies would also cover announcements on investigations, violations, etc. and would be sufficient. Unless more a substantive argument can be made for treating these announcements differently, I would suggest that this recommendation cut entirely.

You might include the terms "publicizing investigations and other preliminary actions" in the first recommendation someplace to slightly emphasize these disclosures. But I'm not even sure I see the need for that.

**Commented [SM11]:** Again this recommendation makes it appear that the only thing the IQA provides that must be duplicated is the correction request mechanism.

Generally this is also a duplication of recommendation 1B, so the easiest thing would probably be to cut this entire recommendation. Unless there is a compelling difference to this recommendation versus 1B.