



Administrative Conference Recommendation 2021-6

Public Access to Agency Adjudicative Proceedings

Adopted December 16, 2021

Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse, as are the processes they use to do so. Some processes are trial-like; others are informal. Some are adversarial; others are non-adversarial. Agencies conduct many different types of proceedings in the course of adjudicating cases, such as investigatory hearings, prehearing and scheduling conferences, settlement conferences, evidentiary hearings, and appellate arguments.¹ Members of the public—participants’ family and friends, media representatives, representatives of non-governmental organizations, researchers, and others—may seek to observe adjudicative proceedings for any number of reasons.

Agencies must determine whether and how to allow public access to the proceedings they conduct. Federal statutes govern how agencies manage public access in some contexts. The Government in the Sunshine Act² and certain statutes specific to particular programs and agencies require that agencies open or close adjudicative proceedings or certain portions thereof to public observation.³ Agencies may need to transcribe or record certain adjudicative

¹ This Recommendation applies however adjudicative proceedings are conducted, including virtually or by telephone or video conferencing.

² 5 U.S.C. § 552b.

³ Members of the public have, in some instances, asserted a right under the First Amendment to access certain agency adjudicative proceedings. *See* Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Proceedings 10–12 (Nov. 22, 2021). Courts have reached different conclusions on whether and in what circumstances such a right exists for administrative proceedings. *Compare* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002), *with* *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 212–213 (3d Cir. 2002). Agencies should be aware of such opinions when establishing policies on public access and responding to requests for public access to adjudicative proceedings they conduct.



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proceedings and may be required, under the Federal Advisory Committee Act⁴ or other laws, to make such records publicly available.⁵ Conversely, the Privacy Act⁶ and other laws and executive-branch policies may require agencies to protect sensitive interests and information.

On top of these legal requirements, many agencies have adopted their own policies regarding public access to adjudicative proceedings.⁷ Settling on a sound policy for determining which proceedings should be open to public observation can require balancing different, and sometimes conflicting, interests. Proceedings open to public observation promote transparency, public accountability, and public understanding of agency decision making. Openness encourages fair process for private parties and promotes accurate and efficient decision making by subjecting arguments and evidence to public scrutiny. And many participants, especially self-represented parties, people with disabilities, and children, benefit from having a family member, friend, personal care attendant, case worker, or other supportive member of the public present at their proceedings.⁸

As with any legal proceeding, however, there can be drawbacks to opening adjudicative proceedings to the public. Many adjudications involve sensitive information that would be

⁴ 5 U.S.C. App. 2, § 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” *Id.* § 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* § 11(b).

⁵ The Administrative Conference has recommended that agencies consider providing access on their websites to supporting adjudicative materials issued and filed in adjudicative proceedings. Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017). Online disclosure of transcripts and recordings of adjudicative proceedings and real-time broadcast of open proceedings can save staff time or money through a reduction in the volume of Freedom of Information Act (FOIA) requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests.

⁶ 5 U.S.C. § 552a.

⁷ See Graboyes & Thomson, *supra* note 3.

⁸ Although family members, friends, personal care attendants, care workers, or other supportive members of the public may wish to attend an adjudicative proceeding as a public observer, such individuals may, in some circumstances, assist or provide support for a party or other participant by serving, for example, as a legal guardian, representative, or interpreter. Individuals who serve in such a role are not considered public observers for purposes of this Recommendation.



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publicly disclosed in an open proceeding. Public disclosure of unverified information or unproven allegations may result in unwarranted reputational harm to private parties. Just as open proceedings allow family members and other supportive members of the public to accompany participants, they also allow in those who would intimidate or harass. Openness may also affect the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to become unduly adversarial or protracted. There can also be administrative costs associated with facilitating in-person or remote observation of adjudicative proceedings by members of the public, providing advance public notice of open proceedings, and providing access to transcripts and recordings of open proceedings. These costs may be warranted in some circumstances but not others.

This Recommendation recognizes that agency adjudicative proceedings vary widely in their purpose, complexity, and governing law and the degree of public interest they attract. It also recognizes that not all agencies can bring the same resources to bear in addressing public access to their adjudicative proceedings. In offering these best practices, the Administrative Conference encourages agencies to develop policies that, in addition to complying with all relevant legal requirements for public access, recognize the benefits of public access for members of the public, private parties, agencies, and other participants and account for countervailing interests, such as privacy and confidentiality.

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

1. Agencies should promulgate and publish procedural regulations governing public access to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of Federal Regulations*. In formulating these regulations, agencies, in addition to adhering to any legal requirements for public access, should consider the benefits of public access and countervailing interests, such as privacy and confidentiality, as elaborated in Paragraph 6. These regulations should include the following:
 - a. A list of proceedings that should be categorically or presumptively open or



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- closed, and standards for determining when adjudicators may or must depart from such presumption in individual cases (see Paragraphs 5–7);
- b. The manners in which members of the public can observe open proceedings, for example by attending in person (e.g., at an agency hearing room) or by remote means (e.g., online or by telephone) (see Paragraphs 8–14);
 - c. Requirements, if any, for advance public notice of proceedings, whether open or closed (see Paragraphs 11–14); and
 - d. The public availability of and means of accessing transcripts and audio and video recordings of proceedings (see Paragraphs 15–17).
2. In conjunction with such regulations, agencies should develop guidelines that set forth, in plain language, the following information for proceedings that are open to the public:
- a. The manner in which agencies will communicate the schedule of upcoming proceedings to the public;
 - b. The location at and manner in which members of the public can observe proceedings;
 - c. The registration process, if any, required for members of the public to observe proceedings and how they should register;
 - d. The agency official whom members of the public should contact if they have questions about observing proceedings;
 - e. Any instructions for accessing agency or non-agency facilities where proceedings are held;
 - f. Any requirements for conduct by public observers (e.g., regarding the possession and use of electronic devices);
 - g. Any protocols for facilitating media coverage; and
 - h. Any policies for managing proceedings that attract high levels of public interest.
3. Agencies should also consider whether presumptively closed proceedings may be open to select members of the public, such as family members or caregivers, and, if so, develop guidelines for such situations that address, as relevant, the information in Paragraph 2.
4. Agencies should provide access to the regulations described in Paragraph 1, the



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guidelines described in Paragraphs 2 and 3, and any other information about public access to adjudicative proceedings, in an appropriate location on their websites.

Standards and Procedures for Determining Which Adjudicative Proceedings Are Open or Closed

5. Agencies ordinarily should presume that evidentiary hearings and appellate proceedings (including oral arguments) are open to public observation. Agencies may choose to close such proceedings, in whole or in part, to the extent consistent with applicable law and if there is substantial justification to do so. Substantial justification may exist, for example, when the need to protect one or more of the following interests can reasonably be considered to outweigh the public interest in openness:
 - a. National security;
 - b. Law enforcement interests;
 - c. Confidentiality of business information;
 - d. Personal privacy interests;
 - e. The interests of minors and juveniles; and
 - f. Other interests protected by statute or regulation.
6. Agencies should consider whether types of adjudicative proceedings other than evidentiary hearings and appellate proceedings (such as investigatory hearings and prehearing conferences), which are typically closed, should be open to public observation. In doing so, agencies, in addition to adhering to any legal requirements for public access, should consider the following:
 - a. Whether public access would promote important policy objectives such as transparency, fairness to parties, accurate and efficient development of records for decision making, or public participation in agency decision making;
 - b. Whether public access would impede important policy objectives such as encouraging candor, achieving consensus, deciding cases and resolving disputes in an efficient manner, preventing intimidation or harassment of participants, avoiding unwarranted reputational harm to participants, or protecting national



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security, law enforcement interests, confidentiality of business information, personal privacy interests, the interests of minors and juveniles, and other interests protected by statute or regulation;

- c. Whether such proceedings or the broader adjudication process of which the proceeding at issue is a part typically include opportunities for public access;
 - d. Whether there is often public interest in observing such proceedings; and
 - e. Whether matters to be discussed at such proceedings ordinarily involve issues of broad public interest or the interests of persons beyond the parties.
7. Agencies should adopt processes for departing from or considering requests to depart from a presumption of open or closed proceedings in particular cases. Agencies should consider addressing the following topics in the procedural regulations described in Paragraph 1:

- a. How parties to a case can request that proceedings that are presumptively open to public observation be closed or that proceedings that are presumptively closed to public observation be open to particular individuals or the general public;
- b. How non-parties to a case can request access, for themselves or the general public, to proceedings that are presumptively closed to public observation;
- c. How parties and non-parties can respond or object to requests regarding public access made in subparagraphs (a) or (b);
- d. Under what circumstances adjudicators or other agency officials can, on their own motion, close proceedings that are presumptively open to public observation or open proceedings that are presumptively closed to public observation;
- e. Whether and how adjudicators or other agency officials must document and notify participants about decisions regarding public access; and
- f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to whom, and how they may do so.

Manner of Public Observation of Open Adjudicative Proceedings

8. When adjudicators conduct open proceedings in public hearing rooms, members of the



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public should have the opportunity to observe the proceedings from the rooms in which they are conducted, subject to reasonable security protocols, resource and space constraints, and concerns about disruptions.

9. Agencies should provide all or select members of the public, such as family members or caregivers, the opportunity to observe open adjudicative proceedings remotely. Agencies should provide remote access in a way that is appropriate for a particular proceeding, such as by providing a dial-in number to select members of the public, such as family members or caregivers, on request, or by livestreaming audio or video of the proceedings to the general public online. Agencies should structure remote access in a way that avoids disruptions, such as by ensuring that public observers cannot unmute themselves or use chat, screen-sharing, document-annotation, and file-sharing functions common in internet-based videoconferencing software.
10. Agencies should consider whether interested members of the public are likely to encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to remedy them. For example, measures may be needed to accommodate people with disabilities, people for whom it may be difficult to make arrangements to travel to locations where proceedings are conducted, and people who do not have access to electronic devices or private internet services necessary to observe proceedings remotely. Agencies may also need to adjust security protocols at the facilities where proceedings are conducted to facilitate in-person attendance while still accounting for reasonable security needs.

Advance Public Notice of Adjudicative Proceedings

11. Agencies should provide advance public notice of open adjudicative proceedings and consider whether to provide advance public notice of closed proceedings, so that the public is aware of such proceedings and can request access to them as specified in Paragraph 7(b). Agencies that determine that advance public notice would be beneficial should consider (a) the best places and publications for providing such notice, (b) the information provided in the notice, and (c) the timing of the notice. Agencies that



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regularly conduct open proceedings should also consider maintaining a schedule of and information about upcoming proceedings in an appropriate location on their websites.

12. To determine the best places and publications for providing advance public notice of adjudicative proceedings, agencies should consider their needs and available resources and the individuals, communities, and organizations that are likely to be interested in or affected by such proceedings. Places and publications where agencies might provide public notice of proceedings include:
 - a. The *Federal Register*;
 - b. A press release, digest, newsletter, or blog post published by the agency;
 - c. An agency events calendar;
 - d. Social media;
 - e. A newspaper or other media outlet that members of the public who may be interested in observing the proceeding are likely to monitor;
 - f. A physical location that potentially interested members of the public are likely to see (e.g., a bulletin board at a jobsite or agency office);
 - g. An email sent to persons who have subscribed to a mailing list or otherwise opted to receive updates about a particular adjudication; and
 - h. A communication sent directly to members of the public, communities, and organizations who may be interested in observing the proceeding.
13. Agencies should include the following information in any public notice for an open adjudicative proceeding, as applicable:
 - a. The name and docket number or other identifying information for the proceeding;
 - b. The date and time of the proceeding;
 - c. The ways that members of the public can observe the proceeding, along with the directions, if any, for registering or requesting access to the proceeding and, for in-person observers, instructions for accessing the facility where the proceeding will take place, including any security or public health protocols and disability accommodations;
 - d. A brief summary of the proceeding's purpose; and



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- e. Contact information for a person who can answer questions about the proceeding.
14. Agencies should determine the appropriate timing for providing and updating public notice of adjudicative proceedings given the nature of their programs and the proceeding at issue. More advance notice may be warranted, for example, if significant public interest in an open proceeding is likely and interested members of the public will need to travel to observe it in person.

Public Access to Transcripts and Recordings of Adjudicative Proceedings

15. Consistent with applicable legal requirements, agencies should consider how they make transcripts and recordings of adjudicative proceedings available to interested members of the public. In addition to providing public access to such materials on their websites, an agency might also, as appropriate:
- a. Make transcripts and recordings available for public inspection in a reading room, docket office, or other agency facility;
 - b. Make transcripts and recordings available for public inspection on another public website, such as a public video sharing website; or
 - c. Provide, or arrange for court reporters working under contract with the government to provide, copies of transcripts and recordings on request for a fee that is no more than the actual cost of duplication, though the agency may charge a reasonable, additional fee for expedited processing.
16. Agencies should take steps to redact any information that is protected by law or policy from public disclosure before providing public access to transcripts and recordings.
17. Agencies should ensure that transcripts and recordings of open proceedings are available for public inspection in a timely manner.