



## Adjudication Materials on Agency Websites

### Committee on Administration and Management

#### Proposed Recommendation | June 16, 2017

1           In contrast to federal court records, which are available for download from the judiciary’s  
2 Public Access to Court Electronic Records (PACER) program (for a fee), or records produced  
3 during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking  
4 website [www.regulations.gov](http://www.regulations.gov), there exists no single, comprehensive online clearinghouse for the  
5 public hosting of decisions and other materials generated throughout the course of federal  
6 administrative adjudication.<sup>1</sup> Instead, to the extent a particular adjudication record is digitally  
7 available, it is likely to be found on the relevant agency’s website.

8           Federal administrative adjudication<sup>2</sup> affects an enormous number of individuals and  
9 businesses engaged in a range of regulated activities or dependent on any of the several  
10 government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions,  
11 and other records generated by agencies and parties involved in adjudication bespeak the  
12 procedural complexities and sophistication of many proceedings. Insofar as adjudicative  
13 proceedings encompass the application of federal power in the disposition of disputes involving  
14 private parties, the records associated with such proceedings are of public importance. Further,

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<sup>1</sup> The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will consider whether the issue merits attention in the future. In the meantime, the research underlying this recommendation is limited to an examination of agencies’ existing websites.

<sup>2</sup> This recommendation is confined to records issued or filed in adjudicative proceedings that are based on oral or written hearings in which one or more parties have an opportunity to introduce evidence or make arguments. The preamble to Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016), refers to such proceedings as either “Type A” or “Type B” adjudication. Type A adjudication consists of proceedings that are regulated by the procedural provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-559, and are commonly referred to as “formal adjudication.” Type B adjudicative proceedings, while not regulated by the APA’s adjudication provisions, are nonetheless subject to legally required evidentiary hearings. Type B proceedings are, along with what the preamble terms “Type C adjudication” (proceedings not subject to legally required evidentiary hearings), commonly referred to as “informal adjudication.”



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15 administrative adjudication records can serve as ready-made models for private parties  
16 (especially those who are self-represented)<sup>3</sup> in drafting their own materials and may provide  
17 insight into the laws and procedures governing proceedings.

18 Many federal laws and directives mandate or encourage the online disclosure of  
19 important government materials, including certain adjudication records. The Freedom of  
20 Information Act (FOIA) requires that agencies electronically disclose “final opinions, including  
21 concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”<sup>4</sup> The  
22 prevailing interpretation of this provision limits its ambit to “precedential” decisions.<sup>5</sup>  
23 Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of  
24 2016,<sup>6</sup> encourage more expansive online disclosure of federal records.<sup>7</sup>

25 In the absence of a comprehensive, government-wide platform akin to PACER or  
26 www.regulations.gov, agencies generally rely on their individual websites to comply with online  
27 transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases,  
28 supporting records produced during adjudicative proceedings. Some agencies host relatively  
29 accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all  
30 agency websites, however, are equally navigable or robust. Additionally, in providing online  
31 access to adjudication materials, agencies utilize navigational and organizational tools and  
32 techniques in various ways.

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<sup>3</sup> The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. *See* Recommendation 2016-6, Self-Represented Parties in Administrative Hearings, 81 Fed. Reg. 94,319 (Dec. 23, 2016).

<sup>4</sup> 5 U.S.C. § 552(a)(2)(A).

<sup>5</sup> *See* U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967); U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.).

<sup>6</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies’ records management programs provide “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” *Id.* § 3102(2).

<sup>7</sup> *See, e.g.*, Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish “public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely”).



33 This recommendation offers best practices and factors for agencies to consider as they  
34 seek to increase the accessibility of adjudication materials on their websites and maintain  
35 comprehensive, representative online collections of adjudication materials, consistent with a  
36 balancing of the transparency objectives and privacy considerations of FOIA and other relevant  
37 laws and directives.<sup>8</sup> It is offered with the knowledge that all agencies are subject to unique  
38 programming, stakeholder, and financial constraints, and that the distinctiveness of agencies'  
39 adjudicative schemes limits the development of workable standardized practices. To the extent  
40 agencies are required to expend additional resources in implementing this recommendation, any  
41 upfront costs incurred may be accompanied by offsetting tangible benefits, whether in the form  
42 of staff time or money saved through a reduction in the volume of FOIA requests or printing  
43 costs, or an increase in the speed with which agency staff will be able to respond to remaining  
44 FOIA requests. In addition, there may also be more intangible benefits engendered by increased  
45 public trust and stakeholder satisfaction.

## RECOMMENDATION

### Disclosure of Adjudication Materials

- 46 1. Agencies should consider maintaining links on their websites to copies of all decisions and  
47 supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudicative  
48 proceedings in excess of the disclosure requirements of the Freedom of Information Act,  
49 subject to relevant law. In determining which materials to disclose, agencies should take into  
50 account the following factors:
- 51 a. the interests of the public and relevant stakeholders in gaining insight into the  
52 agency's internal processes;
  - 53 b. the costs to the agency in disclosing adjudication materials in excess of the Freedom  
54 of Information Act's requirements;
  - 55 c. any offsetting benefits the agency may realize in disclosing these materials;

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<sup>8</sup> For the report undergirding this recommendation, see Daniel J. Sheffner, Adjudication Materials on Agency Websites (April 10, 2017) (report to the Admin. Conf. of the U.S.), *available at* <https://www.acus.gov/report/adjudication-materials-agency-websites-final-report-0>.



- 56 d. the privacy interests of individuals and entities that are the subject of adjudication  
57 materials; and  
58 e. any other relevant considerations, such as agency-specific adjudicative practices.
- 59 2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of  
60 their factual contexts or the legal analyses employed in their dispositions should consider  
61 disclosing materials from representative examples of cases on their websites.

### **Access to Adjudication Materials**

- 62 3. Agencies that choose to post all or nearly all decisions and supporting materials filed in  
63 adjudicative proceedings should endeavor to group materials from the same proceedings  
64 together.
- 65 4. Agencies should endeavor to ensure that visitors to their websites are able to easily locate  
66 adjudication materials by:
- 67 a. displaying links to agency adjudication sections in easily accessible locations on the  
68 website, as well as by maintaining a search engine and a site map or index, or both,  
69 on or locatable from the homepage;
- 70 b. offering relevant filtering and advanced search options in conjunction with their main  
71 search engines that allow users to identify with greater detail the records or types of  
72 records for which they are looking, such as options to sort, narrow, or filter searches  
73 by record type, action or case type, date, case number, party, or specific words or  
74 phrases; and
- 75 c. offering general and advanced search and filtering options specifically within the  
76 sections of their websites that disclose adjudication materials to sort, narrow, or filter  
77 searches by the ways suggested in subparagraph (b).