



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Draft Proposed Recommendation for Committee | July 28, 2020

MORRISON SUGGESTIONS

1 Federal agencies participate in thousands of court cases every year. Most such cases
2 result in “agency litigation materials,” which this recommendation defines as including agencies’
3 publicly filed pleadings, briefs, and consent decrees, as well as court decisions bearing on
4 agencies’ regulatory or enforcement activities. The definition does not include court filings by
5 private parties.

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

11 However valuable public access to agency litigation materials might be, federal law does
12 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of
13 Information Act (FOIA) requires disclosure, and then only when members of the public specify
14 the materials in which they are interested.¹ In the same vein, the E-Government Act of 2002
15 requires federal courts to make their written opinions, including opinions in cases involving
16 federal agencies, available on websites.² But that requirement has not always made judicial
17 opinions readily accessible to the public, partly because most courts’ websites lack functions and
18 features that would allow users to easily identify cases about specific topics or agencies. The
19 most comprehensive sources of agency litigation materials are the Public Access to Court

Commented [MT1]: On August 14, 2020, ACUS Senior Fellow Alan Morrison conveyed this redlined version of the latest draft recommendations for the project on Agency Litigation Webpages. Along with the redlined version, he included the following comments:

“One issue has not been resolved: what to do about DOJ in two respects? Should DOJ do this for some/most/all of its cases, and if it does, should the agency repeat on its website?”

Actually this raises a question for all agencies: are we suggesting that they post ALL their litigation materials and/or for all their cases, or should we recommend some degree of selectivity and how would we define it?”

¹ See 5 U.S.C. § 552(a)(3).

² See 44 U.S.C. § 3502(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

20 Electronic Records (PACER) service and paid legal research services like Westlaw and Lexis.
21 Yet the cost, requirement to provide billing information, and limitations on search functionality
22 ~~might~~ keep some people from using them to find agency litigation materials.

23 Agency litigation webpages are a convenient way for the public to examine agency
24 litigation materials. For purposes of this Recommendation, an agency litigation webpage is a
25 webpage on an agency's website that systematically catalogs and links to agency litigation
26 materials. The documents linked on an agency litigation webpage can include pleadings, briefs,
27 court opinions, and consent decrees. When agencies maintain up-to-date, search-friendly
28 litigation webpages, the public can visit them and quickly find important filings in court cases
29 concerning matters of interest. Agency litigation webpages thus make it easier for the public to
30 learn about the law and to hold government accountable for agencies' actions.

31 Several federal agencies already maintain agency litigation webpages.³ A survey of
32 websites for 25 federal agencies of all stripes revealed a range of practices when it comes to
33 agency litigation webpages.⁴ The survey suggests that most federal agencies do not maintain
34 active agency litigation webpages. Among those that do, the quality of the litigation webpages
35 varies appreciably. Some contain ~~vast troves~~ significant amounts of agency litigation materials;
36 others contain much more limited collections. Some are updated regularly; others are updated
37 only sporadically. Some are easy to locate and search; others are not. In short, there appears to be
38 no standard practice for publishing and maintaining agency litigation webpages, save that all the
39 surveyed litigation webpages contained only the publicly filed versions of litigation materials,
40 with all confidential material—such as trade secrets and personal identifying information—
41 redacted.

Commented [MAB2]: Vast troves sounds almost pejorative, as if they dump everything there so no one can find anything.

³ See Mark Thomson, Draft Report on Agency Litigation Webpages at 15–16 (June 30, 2020) (draft report to the Admin. Conf. of the U.S.) (forthcoming).

⁴ See *id.* at 14–20 (identifying variations in agency practices). The survey conducted for this Recommendation covered agencies of all stripes—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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

42 An inspection of agencies' litigation webpages suggests three general features that make
43 a litigation webpage useful. First, an agency's litigation webpage must be easy to find. Second, it
44 must contain a robust collection of agency litigation materials. Third, those materials must be
45 easy to search and sort.

46 The Conference recognizes that creating and maintaining a useful litigation webpage
47 takes time, money, and effort. The Conference also recognizes that an agency's decision to
48 launch a litigation webpage will necessarily be informed by considerations like the agency's
49 mission, litigation portfolio, existing technological capacity, budget, and the anticipated
50 benefits—public-facing and internal—of creating a litigation webpage. Similarly, decisions
51 about what content to include on a litigation webpage ~~should~~ be tailored to each agency's
52 ~~unique~~ circumstances.

Commented [MAB3]: Unique seemed redundant.

53 Since the decision to create and maintain a litigation webpage involves a balance of
54 factors that will differ from agency to agency, this Recommendation should not be read to
55 suggest that every agency should create and maintain a litigation webpage or to dictate the
56 precise contents or structure of that webpage. It simply offers best practices and factors for
57 agencies to consider in making their litigation materials available on agency litigation webpages.

RECOMMENDATION

Providing Access to Agency Litigation Materials

- 60 1. Agencies should consider providing access on their websites to agency litigation
61 materials, including agencies' publicly filed pleadings, briefs, and consent decrees, as
62 well as court decisions bearing on agencies' regulatory or enforcement activities.
- 63 2. In determining whether to provide access to agency litigation materials on their websites,
64 and in determining which types of agency litigation materials to include on their
65 websites, agencies should consider the following factors:
 - 66 a. The costs of creating and maintaining a webpage providing access to the types of
67 agency litigation materials the agency sees fit to include;

Commented [MAB4]: I would put costs last not first so as not to discourage agencies from doing this. I suggest we discuss best order.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 68 b. ~~The~~ internal benefits of maintaining a webpage providing access to certain types
69 of agency litigation materials;
- 70 c. The public’s interest in having ready access to certain categories of the agency’s
71 litigation materials;
- 72 d. The extent to which providing access to agency litigation materials on the
73 agency’s website will advance the agency’s mission;
- 74 e. The nature of the agency’s litigation portfolio, including the quantity of litigation
75 materials the agency generates each year; and
- 76 f. The degree to which the agency’s existing technological capacity can
77 accommodate the creation and maintenance of a webpage providing access to
78 certain types of agency litigation ~~materials~~.
- 79 3. In determining which agency litigation materials to include on their websites, agencies
80 should ensure that they have implemented appropriate safeguards to protect relevant
81 privacy and business interests implicated by the disclosure of litigation materials. Each
82 agency should implement a protocol to ensure that, before a document is posted to the
83 agency’s litigation webpage, the document has been reviewed and determined not to
84 contain confidential information, such as trade secrets and personal identifying
85 information.
- 86 4. Agencies that choose to post significant quantities of litigation materials on their websites
87 should consider grouping together links to those materials on a single, dedicated
88 webpage—~~what this recommendation refers to as an agency litigation webpage~~. If an
89 agency is organized so that its component units⁵ ~~have~~ their own litigation portfolios, it
90 may make sense for some or all of the component units to have their own litigation
91 webpages, ~~rather than having or for the agency’s to maintain a~~ litigation webpage ~~cover~~
92 ~~all compiling litigation materials from or relating to~~ the agency’s component units.

Commented [MAB5]: If there are such benefits (such as helping agency personnel know what the agency is saying or enabling lawyers to locate relevant pleadings more easily), they should be explained briefly in the preamble. Related to this, will it be of use to other agencies?

Commented [MAB6]: Is this necessary? All of these papers have been filed in court, redacted if necessary, hence they are all public documents. I suggest saying something along those lines in the preamble and do not urge agencies to do any more work and hence be less likely to follow this recommendation.

Commented [MAB7]: Seems unnecessary.

Commented [MAB8]: No footnotes in recommendation. The issue of sub-units within an agency should be addressed in text in the preamble and the recommendation be shortened as suggested.

⁵ 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

93 **Making It Easy to Locate Agency Litigation Webpages**

- 94 5. Agencies should make sure that website users can locate their ~~ir agencies'~~ litigation
95 materials easily on their ~~ir agencies'~~ websites. Agencies ~~can~~ ~~might~~ accomplish this goal by
96 a. Displaying links to agency litigation webpages in readily visible locations on the
97 homepage for the agency's website; and ~~or~~
98 b. Maintaining a search engine and a site map or index, or both, on the agency's
99 homepage.
- 100 6. When an agency collects its component units' litigation materials on a single litigation
101 webpage, those component units ~~should~~ ~~consider~~ ~~posting~~ links, on their websites, to the
102 agency's litigation webpage ~~rather than maintaining their own litigation webpages.~~

Commented [MAB9]: If they do this, they should, and not just consider, doing the posting. No need to be tentative for this.

103 **Making It Easy to Find Relevant Materials on Agency Litigation Webpages**

- 104 7. Agency litigation webpages should group together materials from the same ~~and related~~
105 cases. They might, for example, provide a separate docket page for each case, with a link
106 to the docket page on their litigation webpages. Agencies should consider linking to the
107 grouped-together materials when issuing press releases concerning that litigation.
- 108 8. Agencies should consider offering general and advanced search and filtering options
109 within their litigation webpages. The search and filtering options could, for instance,
110 allow users to sort, narrow, or filter searches according to criteria like action or case type,
111 date, topic, case number, party name, a relevant statute or regulation, or specific words
112 and phrases, along with any other criteria the agency decides are especially useful given
113 its litigation activities.