



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Agency Litigation Webpages

Committee on Judicial Review

Draft Proposed Recommendation for Committee | July 28, 2020

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 defines
3 as including agencies’ publicly filed pleadings, briefs, and settlements, as well as court decisions
4 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.² In the same vein, the E-Government Act of 2002
14 requires federal courts to make their written opinions, including opinions in cases involving
15 federal agencies, available on websites.³ But that requirement has not always made judicial

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).

³ See 44 U.S.C. § 3502(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

16 opinions readily accessible to the public, partly because most courts’ websites lack functions and
17 features that would allow users to easily identify cases about specific topics or agencies.

18 The most comprehensive source of agency litigation materials is the federal courts’ Public
19 Access to Court Electronic Records (PACER) service, which provides the public with
20 instantaneous access to virtually every document filed in every federal court. But users must pay
21 a fee for every search they conduct on PACER and every document they view. Those costs can
22 add up, especially when users are uncertain about what cases or documents they are trying to
23 find. PACER’s limited search functionality also makes it difficult to find cases involving
24 particular agencies, statutes, regulations, or types of agency action. For example, a person
25 interested in identifying ongoing cases to which the United States Fish and Wildlife Service
26 (FWS) is a party would have to search for a host of terms — including “United States Fish and
27 Wildlife Service,” “U.S. Fish and Wildlife Service,” and the names of FWS’s recent directors —
28 just to come close to identifying all such cases. Even after conducting all those searches, the
29 person would still have to scroll through and eliminate search results involving state fish-and-
30 wildlife agencies and private citizens with the same names as FWS’s recent directors. Similarly,
31 were a person interested in finding cases about FWS’s listing of species under the Endangered
32 Species Act (ESA), PACER would not afford that person any way to filter search results to
33 include only cases about ESA listings. The person’s only option would be to open and review
34 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.⁴ While paid legal services, such
37 as Westlaw and Lexis, have far greater search capabilities than PACER’s, their costs can
38 dissuade many individuals and researchers.

Commented [A1]: DOJ had proposed deleting this sentence b/c not accurate with price waivers for certain users or for searches totaling less than \$30/quarter.

Commented [A2]: DOJ proposes deleting what’s currently the last sentence in this footnote.

⁴ PACER can certainly be improved in ways that might make it a more broadly suitable means for identifying and obtaining agency litigation materials. Legislation pending in Congress at the time of this Recommendation is at least one step in that direction. See Electronic Court Records Reform Act of 2019, H.R. 1164, 116th Cong. (2019). ~~But even the improvements proposed in that legislation would not render PACER an adequate substitute for agency litigation webpages, for all the reasons identified above.~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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. To accomplish these goals
47 and to avoid misleading the public, agencies should consider posting opposing counsel’s
48 pleadings and court opinions so that the public sees both sides of an argument and how the
49 dispute is resolved. Along these lines, agencies should not present litigation materials as a
50 means of setting policy, nor should public access to their litigation materials be used to
51 circumvent an agency’s formal rulemaking process. Administrators should be given objective
52 guidance for postings, regardless of whether the agency has prevailed in the case. Agencies also
53 need to be wary of posting descriptions of litigation (outside the pleadings) that do not fairly
54 reflect the case.

55 Several federal agencies already maintain agency litigation webpages.⁵ A survey of
56 websites for 25 federal agencies of all stripes revealed a range of practices regarding agency
57 litigation webpages.⁶ The survey suggests that most federal agencies do not maintain active
58 agency litigation webpages. Among those that do, the quality of the agency litigation webpages
59 varies appreciably. Some contain vast troves of agency litigation materials; others contain much
60 more limited collections. Some are updated regularly; others are updated only sporadically.
61 Some are easy to locate and search; others are not. In short, there appears to be no standard
62 practice for publishing and maintaining agency litigation webpages, save that all the surveyed

⁵ 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).

⁶ 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.

Commented [A3]: DOJ proposed edits here that were not accepted but that ACUS moved to Recommendations # 3.i and 5, *infra*.

DOJ now proposes further edits to ACUS’s language – see further proposed edits to Recommendations # 3.1 and 5.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

63 agency litigation webpages contained only the publicly filed versions of agency litigation
64 materials, with all confidential material—such as trade secrets and personal identifying
65 information—redacted.

66 An inspection of agencies’ litigation webpages suggests four general features that make
67 an agency litigation webpage useful. First, an agency’s litigation webpage must be easy to find.
68 Second, it must contain a representative and up-to-date collection of agency litigation materials.
69 Third, those materials must be easy to search and sort. And fourth, the agency’s litigation
70 webpage must give visitors the information they need to understand the materials on the
71 webpage, including information about materials the agency omitted from the webpage and the
72 criteria the agency employed to determine which materials to include on the webpage.

73 Agency litigation webpages can promote transparency and accountability. The
74 Agency litigation webpages can promote transparency and accountability. The
75 Conference recognizes, however, that creating and maintaining a useful agency litigation
76 webpage takes time, money, and effort. An agency’s decision to launch an agency litigation
77 webpage will necessarily be informed by considerations like the agency’s mission, litigation
78 portfolio, existing technological capacity, budget, and the anticipated benefits—public-facing
79 and internal—of creating an agency litigation webpage. Further, an agency’s decisions about
80 what content to include on an agency litigation webpage should be tailored to the agency’s
81 unique circumstances. An agency that litigates thousands of cases each year, for example, could
82 justifiably choose [not to create an agency litigation webpage at all or choose](#) to feature only a
83 representative sample of agency litigation materials on its agency litigation webpage.

Commented [A4]: DOJ proposed edit.

84 Similarly, an agency that litigates many repetitive, fact-based cases could reasonably
85 choose to post documents from just a few example cases instead of posting documents from all
86 of its cases.⁷ And an agency that litigates many different types of cases, some of obviously

⁷ Cf. Administrative Conference of the United States, Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (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.”).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

87 greater interest to the public than others, might appropriately restrict the contents of its agency
88 litigation webpage to agency litigation materials from the types of cases that are of greater public
89 interest, particularly when the agency determines that the resources required to post more agency
90 litigation materials can be better applied elsewhere.

91 Since the decision to create and maintain an agency litigation webpage involves
92 balancing factors that will differ from agency to agency, this Recommendation should not be
93 read to suggest that every agency create and maintain an agency litigation webpage. Nor should
94 this Recommendation be read as dictating the precise contents or structure of agency litigation
95 webpages. While encouraging the creation and maintenance of agency litigation webpages, the
96 Conference recognizes that an agency's unique circumstances might ultimately militate against
97 creating an agency litigation webpage, or might support only the creation of a comparatively
98 limited agency litigation webpage. At bottom, this Recommendation simply offers best practices
99 and factors for agencies to consider in making their agency litigation materials available on their
100 websites should the agencies choose to do so. The Recommendation leaves the weighing and
101 balancing of those factors to the sound discretion of individual agencies.

RECOMMENDATION

Providing Access to Agency Litigation Materials

- 104 1. Agencies should consider providing access on their websites to publicly filed agency
105 litigation materials, as well as court decisions, bearing on agencies' regulatory or
106 enforcement activities. Agency litigation materials include agencies' publicly filed
107 pleadings, briefs, and settlements.
- 108 2. Should an agency choose to post such material, an agency with a large volume of court
109 litigation could decide not to post documents from every case. The agency might, for
110 instance, post examples of filings from routine litigation and all or a portion of the filings
111 from cases raising important or unusual questions.

Commented [A5]: ACUS suggested this may be a good spot to add language noting that there may be circumstances in which it would be beneficial for the agency to include filings by private parties as a means of putting certain agency litigation materials in context.

Instead DOJ edited Recommendations #3.i and 5, *infra*.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 112 3. In determining whether to provide access to agency litigation materials on their websites,
113 and in determining which types of agency litigation materials to include on their
114 websites, among the factors agencies should consider are the following:
- 115 a. The internal benefits of maintaining a webpage providing access to certain types
116 of agency litigation materials;
 - 117 b. The public's interest in having ready access to certain categories of the agency's
118 litigation materials;
 - 119 c. The availability of other technology that may more reliably and effectively give
120 access to this material because of its scale or volume and the wide variety of
121 issues and matters involved;
 - 122 c.d. The extent to which providing access to agency litigation materials on the
123 agency's website will advance the agency's mission;
 - 124 d.e. The costs of creating and maintaining a webpage providing access to the types of
125 agency litigation materials the agency sees fit to include;
 - 126 e.f. The nature of the agency's litigation portfolio, including the quantity of litigation
127 materials the agency generates each year;
 - 128 f.g. The degree to which the agency's existing technological capacity can
129 accommodate the creation and maintenance of a webpage providing access to
130 certain types of agency litigation materials;
 - 131 g.h. The risk of disclosure or wide dissemination of confidential or sensitive
132 information of private litigants; and
 - 133 h.i. The risk that publication of the agencies' litigation materials without private
134 litigants' positions or court opinions may promote public confusion or
135 misunderstanding.
- 136 4. In determining which agency litigation materials to include on their websites, agencies
137 should ensure that they have implemented appropriate safeguards to protect relevant
138 privacy and business interests implicated by the disclosure of agency litigation materials.
139 Each agency should implement a protocol to ensure that, before a document is posted to
140 the agency's litigation webpage, the document has been reviewed and determined not to

Commented [A6]: DOJ proposes adding the following factor between the factors currently listed as (b) and (c):

The availability of other technological services that may more reliably and effectively give access to this material because of its scale or volume and the wide variety of issues and matters involved;

Commented [A7]: DOJ proposes this edit to ACUS edit to Rec. 3.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

141 contain confidential information, such as trade secrets and personal identifying
142 information.

- 143 ~~Agencies should disclose materials in a way that gives a full and accurate picture of their~~
- 144 ~~Agencies should disclose materials in a way that gives a full and accurate picture of their~~
- 145 ~~Agencies should disclose materials in a way that gives a full and accurate picture of their~~
- 146 ~~Pre-committing to the use of clear, publicly available criteria to determine which~~
- 147 ~~agency litigation materials the agencies will publish on their websites;~~
- 148 ~~Periodically reviewing their websites to make sure the agency litigation materials~~
- 149 ~~there are complete and up to date; and~~
- 150 ~~Providing appropriate context for agency litigation materials, at least where~~
- 151 ~~failure to do so might confuse or mislead the public;~~

152 5. Agencies should disclose materials in a way that gives a full and accurate picture of their
153 litigating positions. To provide proper context and avoid the appearance of selective,
154 misleading, or the improper presentation of agency litigation materials, agencies should:

- 155 a. Use objective, clear, and publicly-posted criteria to determine which agency
156 litigation materials the agencies will publish on their websites;
- 157 b. Regularly review their websites to make sure the agency litigation materials
158 posted there are complete and up-to-date;
- 159 c. Provide appropriate context for agency litigation materials, at least where failure
160 to do so might confuse or mislead the public;
- 161 d. Explain the types of litigation in which the agency is involved and other ways to
162 search for agency litigation materials, including opposing counsel briefs and court
163 opinions;
- 164 e. Consider posting opposing counsel’s pleadings and court opinions so that the
165 public sees both sides of an argument and how the litigation is resolved;
- 166 f. Neither present litigation materials as a means of setting policy, nor use those
167 materials to circumvent an agency’s formal rulemaking process; and

Commented [A8]: To be voted on at next committee meeting.

DOJ proposes replacing this recommendation with the following.

5. Agencies should disclose materials in a way that gives a full and accurate picture of their litigating positions. To provide proper context and avoid the appearance of selective, misleading, or the improper presentation of agency litigation materials, agencies should:
- a. Use objective, clear, and publicly-posted criteria to determine which agency litigation materials the agencies will publish on their websites;
 - b. Regularly review their websites to make sure the agency litigation materials posted there are complete and up-to-date;
 - c. Provide appropriate context for agency litigation materials, at least where failure to do so might confuse or mislead the public;
 - d. Explain the types of litigation in which the agency is involved and other ways to search for agency litigation materials, including opposing counsel briefs and court opinions;
 - e. Consider posting opposing counsel’s pleadings and court opinions so that the public sees both sides of an argument and how the litigation is resolved;
 - f. Neither present litigation materials as a means of setting policy, nor use those materials to circumvent an agency’s formal rulemaking process; and
 - g. Ensure that any descriptions of litigation (outside the pleadings) fairly reflect the case.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

168 [g. Ensure that any descriptions of litigation \(outside the pleadings\) fairly reflect the](#)
169 [case.](#)

170 [5.6.](#) Agencies that choose to post significant quantities of agency litigation materials on their
171 websites should consider grouping together links to those materials on a single, dedicated
172 webpage. If an agency is organized so that its component units have their own litigation
173 portfolios, it may make sense for some or all of the component units to have their own
174 agency litigation webpages, or for the agency to maintain an agency litigation webpage
175 compiling litigation materials from or relating to the agency's component units.

Making It Easy to Locate Agency Litigation Webpages

176
177 [6.7.](#) Agencies that post agency litigation materials on their websites should make sure that
178 website users can easily locate those materials. Agencies can accomplish this goal by
179 a. Displaying links to agency litigation webpages in readily visible locations on the
180 homepage for the agency's website; and
181 b. Maintaining a search engine and a site map or index, or both, on the agency's
182 homepage.

183 [7.8.](#) When an agency collects its component units' litigation materials on a single agency
184 litigation webpage, those component units should post links, on their websites, to the
185 agency's litigation webpage.

Making It Easy to Find Relevant Materials on Agency Litigation Webpages

186
187 [8.9.](#) Agencies and their component units should have substantial flexibility in organizing
188 materials. Agency litigation webpages should consider grouping together materials from
189 the same and related cases. They might, for example, consider providing a separate
190 docket page for each case, with a link to the docket page on their agency litigation
191 webpages. Agencies should consider linking to the grouped-together materials when
192 issuing press releases concerning that litigation.

193 [9-10.](#) Agencies should consider offering general and advanced search and filtering
194 options within their agency litigation webpages. The search and filtering options could,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

195 for instance, allow users to sort, narrow, or filter searches according to criteria like action
196 or case type, date, topic, case number, party name, a relevant statute or regulation, or
197 specific words and phrases, along with any other criteria the agency decides are
198 especially useful given its litigation activities.