



Disclosure of Agency Legal Materials

Ad Hoc Committee

Proposed Recommendation from Committee | May 10, 2023

1 Agencies produce many kinds of legal materials—that is, documents that establish,
2 interpret, apply, explain, or address the enforcement of legal rights and obligations, along with
3 constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials
4 come in many forms, ranging from generally applicable rules, issued after notice and comment,
5 to orders issued in the adjudication of individual cases. Many statutes govern the public
6 disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal
7 Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to
8 proactively disclose certain materials, either by publishing them in the *Federal Register* or
9 posting them on their websites. Other materials must be made available upon request. Some
10 materials, given their nature or content, are exempt from disclosure.

11 Since its establishment, the Administrative Conference has adopted dozens of
12 recommendations encouraging agencies to proactively disclose important legal materials, even
13 beyond what the law currently requires, and to make them publicly available in a readily
14 accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress
15 could implement through legislative action.

¹ Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, *Disclosure of Agency Legal Materials* 5 (Feb. 23, 2023) (draft report to the Admin. Conf. of the U.S.)

² 5 U.S.C. § 552.

³ 41 U.S.C. Chapter 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ Recommendations adopted in recent years include Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 Fed. Reg. 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 Fed. Reg. 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).



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16 Considering the principal statutes governing the disclosure of agency legal materials, the
17 Conference has also identified problems—inconsistencies and uncertainties, for example—that
18 Congress could remedy through statutory reforms. Developed at different times and for different
19 purposes, these statutes contain overlapping requirements that are sometimes difficult to
20 harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from
21 1935—and technological developments and organizational changes have rendered certain
22 provisions outdated or obsolete. Some statutory provisions are vague, which has led to litigation
23 over their meaning and differing agency practices. In a few instances, statutes governing the
24 disclosure of agency legal materials contain drafting errors.⁶

25 To ensure that agencies provide ready public access to important legal materials in the
26 most efficient way possible, this Recommendation identifies several possible statutory reforms
27 that, if enacted by Congress, would provide clear standards as to what legal materials agencies
28 must publish in the *Federal Register*, post on their websites, or otherwise proactively disclose.
29 The Conference recognizes that these statutory reforms would impose additional upfront costs on
30 agencies. At the same time, proactive disclosure of agency legal materials may save staff time or
31 money through a reduction in the volume of FOIA requests or printing costs, or an increase in
32 the speed with which agency staff will be able to respond to remaining FOIA requests.

33 This Recommendation should not be considered as an exhaustive catalog of useful
34 reforms. For example, it does not address the exemptions to FOIA’s general disclosure
35 requirements.⁷ All records identified for proactive disclosure in this Recommendation would still
36 be subject to the exemptions from FOIA, such that if a record were exempt from disclosure upon
37 request, it would be exempt from any proactive disclosure requirement. Congress should also
38 consider timeframes for implementation of the proactive disclosure recommendations, whether
39 for newly created or preexisting agency legal materials.

40 Nothing in this Recommendation should be interpreted to constitute the Conference’s
41 interpretation of the statutes governing the disclosure of agency legal materials. Any
42 recommendation that a statutory provision be amended to “provide” something does not

⁶ See generally Bell et al., *supra* note 1.

⁷ 5 U.S.C. § 552(b).



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43 necessarily mean that the law does not already require it. Nor should this Recommendation be
44 read as superseding the Conference's many previous recommendations on the disclosure of
45 agency legal materials. Unless and until Congress acts, the Conference encourages agencies to
46 adopt the best practices identified in its many previous recommendations.

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

- 47 1. Congress should amend 5 U.S.C. § 552(a)(2) to provide, subject to paragraph 2 of this
48 Recommendation, that each agency make available on its website:
- 49 a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C.
50 § 554 and 556–557 or otherwise issued after a legally required opportunity for an
51 evidentiary hearing. Each agency should proactively disclose any such opinion or
52 order regardless of whether the agency designates the opinion or order as
53 precedential, published, or other similar designation;
 - 54 b. Written documents that communicate to a member of the public the agency's
55 decision not to enforce a legal requirement against an individual or entity. Such
56 documents may include decisions to grant an individual or entity a waiver or
57 exemption, and advisory opinions that apply generally applicable legal
58 requirements to specific facts or explain how the agency will exercise its
59 discretion in particular cases;
 - 60 c. Written legal opinions and memoranda issued by or under the authority of its
61 chief legal officers that bind agency officials as a matter of law in the
62 performance of their duties;
 - 63 d. Settlement agreements to which the agency is a party;
 - 64 e. Memoranda of understanding, memoranda of agreement, and other similar inter-
65 agency or inter-governmental agreements that affect a member of the public;
 - 66 f. Any operative agency delegations of legal authority; and
 - 67 g. Any operative orders of succession for agency positions whose occupants must be
68 appointed by the President with the advice and consent of the Senate.



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- 69 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,
70 pursuant to notice and receipt of public comment, except for good cause pursuant to 5
71 U.S.C. § 553, providing that it will not proactively disclose some records described in
72 paragraph 1 of this Recommendation, because individual records do not vary
73 considerably in terms of their factual contexts or the legal issues they raise, or that
74 proactive disclosure of such documents would be misleading. Any such rule should
75 explain which records the agency will not proactively disclose and what other
76 information (e.g., aggregate data, representative samples), if any, the agency will
77 proactively disclose instead to adequately inform the public about agency activities.
- 78 3. Congress should require OMB to ensure that agencies:
- 79 a. develop and post disclosure plans—internal management plans and procedures for
80 making legal materials available online on their websites; and
- 81 b. designate an officer responsible for overseeing the development and
82 implementation of the proactive disclosure plans described in paragraph 3(a), and
83 for overseeing the agency’s compliance with all legal requirements for the
84 proactive disclosure of agency legal materials.
- 85 4. Because various provisions of the E-Government Act, Public Law Number 107-347,
86 governing proactive disclosure are duplicative, contain drafting errors, or are outdated,
87 Congress should amend the statute to:
- 88 a. Delete § 206(b);
- 89 b. Delete “and (b)” in § 207(f)(1)(A)(ii);
- 90 c. Eliminate references to the Interagency Committee on Government Information,
91 which no longer exists. Congress should instead require that the Office of
92 Management and Budget, after consultation with the Federal Web Managers
93 Council, update its guidance on federal agency public websites at least every two
94 years to ensure that agencies present legal materials on their websites in a clear,
95 logical, and readily accessible fashion.
- 96 5. Congress should provide that each agency should post each of its legislative rules on its
97 website, and should, to the extent feasible, include links to related agency legal materials,



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98 such as guidance documents explaining the rule or significant adjudicative opinions
99 interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

- 100 6. Congress should provide that a person may use the process described in 5 U.S.C.
101 § 552(a)(3) to request that an agency proactively disclose certain records when the
102 requestor alleges the agency is legally required to proactively disclose the records but has
103 not done so.
- 104 7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an
105 agency has not proactively disclosed records when legally required to do so, the
106 reviewing court may order the agency to proactively disclose them in the manner
107 required by law. Congress should also provide that a requester must exhaust
108 administrative remedies required by 5 U.S.C. § 552 before filing a complaint in district
109 court to compel an agency to proactively disclose records.

Official Edition of *Federal Register*

- 110 8. Congress should provide that the online version of the *Federal Register*, which is
111 currently an unofficial informational resource, is the official edition of the *Federal*
112 *Register* and eliminate any statutory requirement in 44 U.S.C. Chapter 15 or elsewhere
113 that the printed version of the *Federal Register* is the official edition.

Preparation of Proposed Legislation

- 114 9. The Conference's Office of the Chair should prepare and submit to Congress proposed
115 statutory changes consistent with this Recommendation.