



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation | December 16, 2021

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council (with source shown in the margin).

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

9 Agencies must determine whether and how to allow public access to the proceedings they
10 conduct. ~~Federal statutes govern how agencies manage public access in some contexts. The~~
11 ~~Constitution and federal statutes establish the basic parameters for that determination. The~~
12 ~~Supreme Court has interpreted the First Amendment to provide a general right of public access~~
13 ~~to judicial proceedings,¹ and a number of federal courts have held that the same right extends to~~
14 ~~at least some proceedings conducted by administrative agencies.² Federal statutes, such as the~~

¹ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 55 (1980).

² See Jeremy Graboyes & Mark Thomson, *Public Access to Agency Adjudicative Proceedings 10–12* (Oct. 15, 2021) (draft report to the Admin. Conf. of the U.S.).



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15 Government in the Sunshine Act³ and certain statutes specific to particular programs and
16 agencies, require that agencies open or close adjudicative proceedings or certain portions thereof
17 to public observation.⁴ Agencies may need to transcribe or record certain adjudicative
18 proceedings and may be required, under the Federal Advisory Committee Act⁵ or other laws, to
19 make such records publicly available.⁶ Conversely, the Privacy Act⁷ and other laws and
20 executive-branch policies may require agencies to protect sensitive interests and information.

21 On top of these constitutional and statutory legal requirements, many agencies have
22 adopted their own policies regarding public access to adjudicative proceedings.⁸ Settling on a
23 sound policy for determining which proceedings should be open to public observation can
24 require balancing different, and sometimes conflicting, interests. Proceedings open to public
25 observation promote transparency, public accountability, and public understanding of agency
26 decision making. Openness encourages fair process for private parties and promotes accurate and
27 efficient decision making by subjecting arguments and evidence to public scrutiny. And many
28 participants, especially self-represented parties, people with disabilities, and children, benefit

Commented [CA1]: Proposed Amendment from Council #1 (including footnote 4; see also related amendments at lines 21, 48, 54, 111–12, and 212):

The Supreme Court has not clearly interpreted the First Amendment to provide a general right of public access to government proceedings outside the criminal context. The proposed footnote explains, without definitively stating that such a right exists for administrative proceedings, that agencies should be aware that some have asserted such a right and that lower courts have reached different conclusions on whether and when such a right exists.

Commented [CA2]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 48, 54, 111–12, and 212)

³ 5 U.S.C. § 552b.

⁴ 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). Although the issue is infrequently litigated, agencies should be aware of such opinions when establishing policies on public access and responding to requests for public access to proceedings they conduct.

⁵ 5 U.S.C. App. 112, § 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.” 5 U.S.C. App. *Id.* § 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* § 11(b).

⁶ 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.

⁷ *Id.* § 552a.

⁸ See Graboyes & Thomson, *supra* note 2.



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29 from having a family member, friend, personal care attendant, case worker, or other supportive
30 member of the public present at their proceedings.

31 As with any legal proceeding, however, there can be drawbacks to opening adjudicative
32 proceedings to the public. Many adjudications involve sensitive information that would be
33 publicly disclosed in an open proceeding. Public disclosure of unverified information or
34 unproven allegations may result in unwarranted reputational harm to private parties. Just as open
35 proceedings allow family members and other supportive members of the public to accompany
36 participants, they also allow in those who would intimidate or harass. Openness may also affect
37 the dynamic of agency proceedings, leaving them vulnerable to disruption or leading them to
38 become unduly adversarial or protracted. There can also be administrative costs associated with
39 facilitating in-person or remote observation of adjudicative proceedings by members of the
40 public, providing advance public notice of open proceedings, and providing access to transcripts
41 and recordings of open proceedings. These costs may be warranted in some circumstances but
42 not others.

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

Commented [CA3]: Proposed Amendment from Council #1
(see related amendments at lines 10-17 and parallel
amendments at lines 21, 54, 111-12, and 212)

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

- 51 1. Agencies should promulgate and publish procedural regulations governing public access
52 to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of*



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53 *Federal Regulations*. In formulating these regulations, agencies, in addition to adhering
54 to any ~~constitutional or statutory~~ legal requirements for public access, should consider the
55 benefits of public access and countervailing interests, such as privacy and confidentiality,
56 as elaborated in Paragraph 6. These regulations should include the following:

- 57 a. A list of proceedings that should be categorically or presumptively open or
58 closed, and standards for determining when adjudicators may or must depart from
59 such presumption in individual cases (see Paragraphs 5–7);
 - 60 b. The manners in which members of the public can observe open proceedings, for
61 example by attending in person (e.g., at an agency hearing room) or by remote
62 means (e.g., online or by telephone) (see Paragraphs 8–14);
 - 63 c. Requirements, if any, for advance public notice of proceedings, whether open or
64 closed (see Paragraphs 11–14); and
 - 65 d. The public availability of and means of accessing transcripts and audio and video
66 recordings of proceedings (see Paragraphs 15–17).
- 67 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in
68 plain language, the following information for proceedings that are open to the public:
- 69 a. The manner in which agencies will communicate the schedule of upcoming
70 proceedings to the public;
 - 71 b. The location at and manner in which members of the public can observe
72 proceedings;
 - 73 c. The registration process, if any, required for members of the public to observe
74 proceedings and how they should register;
 - 75 d. The agency official whom members of the public should contact if they have
76 questions about observing proceedings;
 - 77 e. Any instructions for accessing agency or non-agency facilities where proceedings
78 are held;
 - 79 f. Any requirements for conduct by public observers (e.g., regarding the possession
80 and use of electronic devices);
 - 81 g. Any protocols for facilitating media coverage; and

Commented [CA4]: Proposed Amendment from Council #1
(see related amendments at lines 10–17 and parallel
amendments at lines 21, 48, 111–12, and 212)



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- 82 h. Any policies for managing proceedings that attract high levels of public interest.
- 83 3. Agencies should also consider whether presumptively closed proceedings may be open to
- 84 select members of the public, such as family members or caregivers, and, if so, develop
- 85 guidelines for such situations that address, as relevant, the information in Paragraph 2.
- 86 4. Agencies should post the regulations described in Paragraph 1, the guidelines described
- 87 in Paragraphs 2 and 3, and any other information about public access to adjudicative
- 88 proceedings, in an appropriate location on their websites.

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

- 89 5. Agencies ordinarily should adopt the presumption ~~presume~~ that evidentiary hearings and
- 90 appellate proceedings (including oral arguments) are open to public observation. Such
- 91 proceedings and may be closed, in whole or in part, only to the extent consistent with
- 92 applicable law and if there is substantial justification to do so. the First Amendment and
- 93 other potential constitutional and statutory bases for requiring open proceedings, and only
- 94 to the extent necessary to protect compelling interests such as: Substantial justification
- 95 may exist, for example, when the need to protect one or more of the following interests
- 96 can reasonably be considered to outweigh the public interest in openness:
 - 97 a. National security;
 - 98 b. Law enforcement interests;
 - 99 c. Confidentiality of sensitive business information;
 - 100 d. Especially sensitive personal privacy interests;
 - 101 e. The interests of minors and juveniles; and
 - 102 f. Other interests protected by statute or regulation.

103 In some programs, it may be that the need to protect one or more of these interests or

104 categories of information will ordinarily outweigh the public interest in open

105 proceedings. For such programs, agencies may presume that all parts of proceedings will

106 be closed to public observation while retaining the ability to open these proceedings, in

107 whole or in part, in particular cases or to particular individuals.

Commented [CAS]: Proposed Amendment from Council #2



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- 108 6. Agencies should consider whether types of adjudicative proceedings other than
109 evidentiary hearings and appellate proceedings (such as investigatory hearings and
110 prehearing conferences), which are typically closed, should be open to public
111 observation. In doing so, agencies, in addition to adhering to any **constitutional or**
112 **statutory/legal** requirements for public access, should consider **at a minimum**, the
113 following:
- 114 a. Whether public access would promote important policy objectives such as
115 transparency, fairness to parties, accurate and efficient development of records for
116 decisionmaking, or public participation in agency decision making;
 - 117 b. Whether public access would impede important policy objectives such as
118 encouraging candor, achieving consensus, deciding cases and resolving disputes
119 in an efficient manner, preventing intimidation or harassment of participants,
120 avoiding unwarranted reputational harm to participants, or protecting national
121 security, law enforcement, confidentiality of sensitive business information,
122 especially sensitive personal privacy interests, the interests of minors and
123 juveniles, and other similarly compelling interests;
 - 124 c. Whether such proceedings or the broader adjudication process of which the
125 proceeding at issue is a part typically include opportunities for public access;
 - 126 d. Whether there is often public interest in observing such proceedings; and
 - 127 e. Whether matters to be discussed at such proceedings ordinarily involve issues of
128 broad public interest or the interests of persons beyond the parties.
- 129 7. Agencies should **consider adopting** processes for departing from or considering requests
130 to depart from a presumption of open or closed proceedings in particular cases. Agencies
131 should consider addressing the following topics in the procedural regulations described in
132 Paragraph 1:
- 133 a. How parties to a case can request that proceedings that are presumptively open to
134 public observation be closed or that proceedings that are presumptively closed to
135 public observation be open to particular individuals or the general public;
 - 136 b. How non-parties to a case can request access, for themselves or the general

Commented [CA6]: Proposed Amendment from Council #1
(see related amendments at lines 10–17 and parallel
amendments at lines 21, 48, 54, and 212)

Commented [CA7]: Proposed Amendment from Council #3



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- 137 public, to proceedings that are presumptively closed to public observation;
138 c. How parties and non-parties can respond or object to requests regarding public
139 access made in subparagraphs (a) or (b);
140 d. Under what circumstances adjudicators or other agency officials can, on their own
141 motion, close proceedings that are presumptively open to public observation or
142 open proceedings that are presumptively closed to public observation;
143 e. Whether and how adjudicators or other agency officials must document and notify
144 participants about decisions regarding public access; and
145 f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to
146 whom, and how they may do so.

Manner of Public Observation of Open Adjudicative Proceedings

- 147 8. When adjudicators conduct open proceedings in public hearing rooms, members of the
148 public should have the opportunity to observe the proceedings from the rooms in which
149 they are conducted, subject to reasonable security protocols, resource and space
150 constraints, and concerns about disruptions.
- 151 9. Agencies should provide all or select members of the public, **such as family members or**
152 **caregivers,** the opportunity to observe open adjudicative proceedings remotely. Agencies
153 should provide remote access in a way that is appropriate for a particular proceeding,
154 such as by providing a dial-in number to select members of the public, **such as family**
155 **members or caregivers,** on request or by livestreaming audio or video of the proceedings
156 to the general public online. Agencies should structure remote access in a way that avoids
157 disruptions, such as by ensuring that public observers cannot unmute themselves or use
158 chat, screen-sharing, document-annotation, file-sharing functions common in internet-
159 based videoconferencing software. **Agencies should be aware that members of the public,**
160 **including the press, may choose to record and disseminate audio or video transmissions**
161 **in whole or in part regardless of the rules that may apply in physical hearing rooms.**
- 162 10. Agencies should consider whether interested members of the public are likely to
163 encounter any barriers to accessing open adjudicative proceedings and, if so, take steps to

Commented [CA8]: Proposed Amendment from Council #4 (see parallel amendment at lines 154–55):

As written, it is unclear to whom “select members of the public” refers. If “select members of the public” is intended to have the same meaning as in Paragraph 3, the Council recommends restating the appositive (“such as family members or caregivers”) that follows the phrase in that paragraph.

Commented [CA9]: Proposed Amendment from Council #4 (see parallel amendment at lines 151–52)

Commented [CA10]: Proposed Amendment from Council Amendment #5:

The Council presumes that this sentence is not intended to state that third-party recording is permissible, but rather only to state a predicative fact as to what members of the public may do when accessing proceedings remotely. If that’s the case, the sentence is not a recommendation, consistent with ACUS practice, should not appear as one. (If the Committee did intend to state that recording is permissible, it would ask the Committee to explain the legal basis of the statement.)



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164 remedy them. For example, measures may be needed to accommodate people with
165 disabilities, people for whom it may be difficult to make arrangements to travel to
166 locations where proceedings are conducted, and people who do not have access to
167 electronic devices or private internet services necessary to observe proceedings remotely.
168 Agencies may also need to adjust security protocols at the facilities where proceedings
169 are conducted to facilitate in-person attendance while still accounting for reasonable
170 security needs.

Advance Public Notice of Adjudicative Proceedings

- 171 11. Agencies should provide advance public notice of open adjudicative proceedings and
172 consider whether to provide advance public notice of closed proceedings, so that the
173 public is aware of such proceedings and can request access to them as specified in
174 Paragraph 7(b). Agencies that determine that advance public notice would be beneficial
175 should consider (a) the best places and publications for providing such notice, (b) the
176 information provided in the notice, and (c) the timing of the notice. Agencies that
177 regularly conduct open proceedings should also consider maintaining a schedule of and
178 information about upcoming proceedings in an appropriate location on their websites.
- 179 12. To determine the best places and publications for providing advance public notice of
180 adjudicative proceedings, agencies should consider their needs and available resources
181 and the individuals, communities, and organizations that are likely to be interested in or
182 affected by such proceedings. Places and publications where agencies might provide
183 public notice of proceedings include:
- 184 a. *The Federal Register*;
 - 185 b. A press release, digest, newsletter, or blog post published by the agency;
 - 186 c. An agency events calendar;
 - 187 d. Social media;
 - 188 e. A newspaper or other media outlet that members of the public who may be
189 interested in observing the proceeding are likely to monitor;
 - 190 f. A physical location that potentially interested members of the public are likely to



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- 191 see (e.g., a bulletin board at a jobsite or agency office);
- 192 g. An email sent to persons who have subscribed to a mailing list or otherwise opted
- 193 to receive updates about a particular adjudication; and
- 194 h. A communication sent directly to members of the public, communities, and
- 195 organizations who may be interested in observing the proceeding.
- 196 13. Agencies should include the following information in any public notice for an open
- 197 adjudicative proceeding, as applicable:
- 198 a. The name and docket number or other identifying information for the proceeding;
- 199 b. The date and time of the proceeding;
- 200 c. The ways that members of the public can observe the proceeding, along with the
- 201 directions, if any, for registering or requesting access to the proceeding and, for
- 202 in-person observers, instructions for accessing the facility where the proceeding
- 203 will take place, including any security or public health protocols and disability
- 204 accommodations;
- 205 d. A brief summary of the proceeding's purpose; and
- 206 e. Contact information for a person who can answer questions about the proceeding.
- 207 14. Agencies should determine the appropriate timing for providing and updating public
- 208 notice of adjudicative proceedings given the nature of their programs and the proceeding
- 209 at issue. More advance notice may be warranted, for example, if significant public
- 210 interest in an open proceeding is likely and interested members of the public will need to
- 211 travel to observe it in person.

Public Access to Transcripts and Recordings of Adjudicative Proceedings

- 212 15. Consistent with applicable ~~constitutional and statutory legal~~ requirements ~~and the~~
- 213 ~~objectives identified in Paragraph 1~~, agencies should consider how they make transcripts
- 214 and recordings of adjudicative proceedings available to interested members of the public.
- 215 In addition to providing public access to such materials on their websites, an agency
- 216 might also, as appropriate:
- 217 a. Make transcripts and recordings available for public inspection in a reading room,

Commented [CA11]: Proposed Amendment from Council #1 (see related amendments at lines 10–17 and parallel amendments at lines 21, 48, 54, and 111–12)



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- 218 docket office, or other agency facility;
- 219 b. Make transcripts and recordings available for public inspection on another public
- 220 website, such as a public video sharing website; or
- 221 c. Provide, or arrange for court reporters working under contract with the
- 222 government to provide, copies of transcripts and recordings on request for a fee
- 223 that is no more than the actual cost of duplication, though the agency may charge
- 224 a reasonable, additional fee for expedited processing.
- 225 16. Agencies should take steps to redact any information that is protected by law or policy
- 226 from public disclosure before providing public access to transcripts and recordings.
- 227 17. Agencies should ensure that transcripts and recordings of open proceedings are available
- 228 for public inspection in a timely manner.