

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Disclosure of Agency Legal Materials; Request for Comments

AGENCY: Administrative Conference of the United States (ACUS).

ACTION: Notice; request for comments.

SUMMARY: The Office of the Chairman of ACUS is requesting public input on what legal materials agencies must or should make publicly available and how they ought to do so.

Responses to this request may inform an ongoing ACUS project, *Disclosure of Agency Legal Materials*. If warranted, the project will recommend statutory reforms to ensure that agencies provide public access to legal materials in the most equitable, effective, and efficient way possible for both the public and agencies.

DATES: Comments must be received no later than 10:00 a.m. (ET) July 18, 2022.

ADDRESSES: You may submit comments by email to info@acus.gov, online by clicking “Submit a comment” near the bottom of the project web page found at <https://www.acus.gov/research-projects/disclosure-agency-legal-materials>, or by U.S. Mail addressed to Disclosure of Agency Legal Materials Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036. ACUS will ordinarily post comments on the project web page as they are received. Commenters should not include information, such as personal information or confidential business information, that they do not wish to appear on the ACUS website. For the full ACUS public comment policy, please visit <https://www.acus.gov/policy/public-comment-policy>.

FOR FURTHER INFORMATION CONTACT:

Todd Rubin, Attorney Advisor, Administrative Conference of the United States, 1120 20th Street NW, Suite 706 South, Washington, DC 20036; Telephone (202) 480-2080; email *trubin@acus.gov*.

SUPPLEMENTARY INFORMATION:

The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov*.

Disclosure of Agency Legal Materials

Agencies generate a wide range of materials that impose legal obligations on members of the public, agency employees, and agency heads; determine the rights or interests of private parties; advise the public of the agencies' interpretation of the statutes and rules they administer; advise the public prospectively of the manner in which agencies plan to exercise discretionary powers; or otherwise explain agency actions that affect members of the public. Federal laws govern when and how agencies make these legal materials publicly available. These include generally applicable statutes such as the Freedom of Information Act (FOIA), the Federal Register Act, the E-Government Act of 2002, the Federal Records Act, as well as agency- and program-specific statutes.

ACUS has undertaken many projects in which it has recommended best practices for the disclosure of records such as guidance documents,¹ adjudication rules,² adjudication materials,³ and litigation materials.⁴ Many of these projects focus on a broader set of materials than legal materials, but they do encompass, touch on, or include legal materials. A recurrent question in the discussion surrounding these projects has been whether Congress should amend the main statutes governing disclosure of agency legal materials to consolidate and harmonize overlapping requirements, account for technological developments, and correct statutory ambiguities and drafting errors.

ACUS is now undertaking this project to answer this question. A team of leading scholars will submit a report to ACUS that addresses this question and others that may be identified. If warranted, a committee of ACUS members will develop proposed recommendations to Congress for possible consideration by the ACUS Assembly. Recommended statutory reforms will provide clear standards as to what legal materials agencies must publish and where they must publish them (whether in the *Federal Register*, on their websites, or elsewhere). The objective of any such proposed amendments will be to ensure that agencies provide appropriate public access to legal materials in the most equitable, effective, and efficient way possible for both the public and the agency. Visit <https://www.acus.gov/research-projects> to learn more about how ACUS develops recommendations.

¹ See, e.g., 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 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931 (Aug. 8, 2019).

² See, e.g., 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 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

³ See, e.g., Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31039 (July 5, 2017).

⁴ See, e.g., Admin. Conf. of the U.S., Recommendation 2020-6, *Agency Litigation Webpages*, 86 Fed. Reg. 6624 (Jan. 22, 2021).

Specific Topics for Public Comment

ACUS welcomes views, information, and data on all aspects of this topic. ACUS also seeks specific feedback on the following questions:

1. What types of agency records should ACUS consider to be “agency legal materials” for purposes of this project?
2. What obstacles have you or others faced in gaining access to agency legal materials?
3. Are there certain types of agency legal materials or legal information that agencies are not making publicly available that would be valuable to you or others?
4. Agencies provide public access to legal materials in different ways. Agencies make some materials available to the general public on their own initiative without having received a request from a member of the public (i.e., proactive disclosure). Other materials are provided to members of the public on request. What types of legal materials should agencies proactively disclose to the general public? What types of legal materials may or should agencies disclose only in response to a request from a member of the public?
5. For agency legal materials that should be proactively disclosed, where or how should agencies make them publicly available (on agency websites, in the *Federal Register*, or elsewhere)?
6. Are there certain types of agency legal materials, or certain types of information contained in agency legal materials, that agencies should not make publicly available? When there is public interest in these types of materials or information, how should agencies balance the public interest in disclosure with any private or governmental interests in nondisclosure?

7. Some statutes governing the public availability of agency legal materials apply to most or all agencies (e.g., Federal Register Act), whereas others apply to only one or a small number of agencies (e.g., Food and Drug Administration Modernization Act of 1997). When should Congress create disclosure requirements that apply to most or all agencies, and when should Congress create disclosure requirements that apply to only one or a small number of agencies?
8. Are there certain best practices regarding disclosure of legal materials on agency websites that should be required by statute (e.g., indexing of legal materials, search functions to help find legal materials)? If so, should these practices be required for all legal materials or only certain types of legal materials?
9. What inconsistencies, ambiguities, and overlaps exist in the main statutes governing disclosure of agency legal materials (e.g., FOIA, Federal Register Act, E-Government Act of 2002, Federal Records Act) that Congress should remedy?
10. What other statutory reforms might be warranted to ensure adequate public availability of agency legal materials?

Dated: May 19, 2022

Shawne McGibbon,

General Counsel.