



Recommendation 89-8

Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions

(Adopted December 14, 1989)

This recommendation examines the obligation of agencies to index and make their adjudicatory decisions available to the public.

The Freedom of Information Act (FOIA) imposes numerous affirmative disclosure obligations on agencies. Under 5 U.S.C. 552(a)(2), each agency, in accordance with published rules, is required to make final adjudicatory decisions and orders¹ available for public inspection and copying unless the materials are promptly published and copies are offered for sale. In addition, each agency shall maintain and make available for public inspection and copying current indexes that provide identifying information for the public as to any matter issued, adopted, or promulgated. FOIA further mandates each agency shall promptly publish, quarterly or more frequently, and distribute copies of each index unless it determines, by order published in the Federal Register, that such publication is unnecessary and impracticable.

Many agencies do, in fact, index and publish or otherwise make available to the public their adjudicatory decisions, as required under FOIA (e.g., the National Labor Relations Board, the Merit Systems Protection Board, the Interstate Commerce Commission, the Securities and Exchange Commission). This recommendation, then, is addressed to those agencies which either entirely fail to index, publish or make their decisions available to the public or fail to do so adequately, whether or not they use adjudicatory precedent to pronounce and develop agency policy.

Debate has surrounded consideration of an appropriate test for determining which types of adjudicatory decisions are included in this affirmative disclosure obligation. The Attorney General initially expressed the opinion that FOIA requires that agencies index only those decisions cited by an agency or relied upon as precedent. This limitation, in the view of the

¹ This subsection also covers agency statements of policy and interpretations, as well as administrative staff manuals and instructions to staff that affect a member of the public. The Conference has already recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible, ACUS Recommendation 71-3 "Articulation of Agency Policies." See also ACUS Recommendation 70-3, "SEC No-Action Letters Under section 4 of the Securities Act of 1933."



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Attorney General, was derived from both the enforcement provision in the statute, which precludes the agency from giving precedential effect to matters not indexed, and the legislative history of the statute, which indicates that the disclosure provision was intended to make available documents having precedential significance. The Attorney General also was influenced by the impracticality of indexing all agency decisions.

Application of the affirmative disclosure requirements, beyond simply precedential decisions, however, offers several advantages. First, if agencies index all significant decisions, and not just those decisions deemed to be precedential, agencies would be less inclined to be restrictive or one-sided in the selection of cases to be accorded precedential effect. Second, private parties affected by agency action would be in a better position to learn of and influence agency policy. Third, a broader application of affirmative disclosure requirements would implement the underlying aim of the FOIA indexing requirements which is to afford citizens the essential information needed to deal effectively and knowledgeably with federal agencies and to guard against the development of secret law. Lastly, a current index of final decisions may assist agencies in developing standards and policies with respect to general issues and recurring questions.

The few cases dealing with the FOIA affirmative disclosure obligations have generally read the precedential test broadly. They require disclosure not only of decisions that an agency considers to be binding but also all decisions that an agency retains for general reference and research. The recommended approach to the indexing and public availability of final decisions focuses less on the binding nature of the precedent and more on the value that decisions can have to inform and assist the public.

Recommendation

1. Indexing of Agency Decisions

Agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions so as to afford citizens information useful in dealing with the agencies and to assist the development of agency standards and policies on general issues and recurring questions.²

² In programs where the agency has established a policy that none of its decisions have precedential effect, the Conference urges that the agency re-examine the feasibility of creating a system that accords certain decisions



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In meeting FOIA indexing requirements, agencies should ensure a subject-matter index is made of their decisions and that the index includes all significant decisions, whether or not the decisions are designated as precedential.

2. Level and Scope of Decisions Indexed

The index should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final. The adjudicatory decisions intended to be covered by this recommendation are those made with an accompanying written opinion or rationale in contested cases after an opportunity for a hearing at some stage of the proceeding.

3. Index Contents

Agency indexes should be designed for effective and efficient use. These indexes should contain sufficient information on each indexed decision to identify the major issues decided and the location of the case file. Agencies should adopt one of the following practices in indexing their adjudicatory decisions:

A. *Universal Index.* Index all final decisions; or

B. *Selective Index.* Where the volume of decisions makes a universal index impracticable or uninformative, selectively index final decisions omitting those decisions that are repetitive. The selective index should include all significant decisions. Decisions may be significant because they are deemed by the agency to be precedential or otherwise establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the policy in areas where the law is unsettled, deal with important emerging trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed.

4. Public Notice of the Index

Agency indexes should be fully disclosed and readily available. Appropriate notice of the existence of unpublished decisions should also be given in both the agency's FOIA regulations and the procedural or substantive regulations governing the specific program.

precedential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards. See ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87-7. See also ACUS Recommendation 71-5, "Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications."



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5. Computer Technology

Agencies should explore the use of computer technology in order to promote accessibility and reduce costs of indexing.

Citations:

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