



**Agency Publicity in the Internet Era**  
**Committee on Administration and Management**  
**Proposed Recommendation | October 21, 2015**

1 In 1973, the Administrative Conference issued Recommendation 73-1, “Adverse Agency  
2 Publicity,” recommending that agencies adopt rules containing minimum standards and  
3 structured practices governing the issuance of publicity that may adversely affect identified  
4 persons.<sup>1</sup> At the time, traditional forms of publicity, such as the press release, were the  
5 primary vehicle for agencies to communicate with the public. Subsequent technological  
6 developments have led to reductions in the cost and great increases in the speed of agencies’  
7 collecting, storing and communicating information, including the predominance of Internet-  
8 based communications, expansion of the Internet, the emergence of social media, and the  
9 proliferation of searchable online databases capable of storing large amounts of information.  
10 These technical advances have created new avenues for agencies to publicly disseminate  
11 information about private parties, as well as new challenges for agencies in managing the  
12 distribution of information to the public.

13 In this recommendation, the Conference builds upon and supplements the 1973  
14 Recommendation and urges agencies to adopt policies and best practices that adequately  
15 balance public and private interests in the rapidly changing landscape of modern information  
16 disclosure.

**Modern Agency Publicity**

17 Many agencies are authorized and even required by statute to issue public statements  
18 about their activities. There are two potential types of costs from agency publicity – not  
19 providing the information fast enough and providing the information too quickly. On the

<sup>1</sup> See Administrative Conference of the United States, Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16,839 (Jun. 27, 1973) [hereinafter Recommendation 73-1].

**Commented [AO1]:** I would like to make explicit that there are costs to waiting and costs to moving quickly. The draft (and consultant’s report) seem focused on the second type of error.



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20 former, aAgency use of these statements to inform or warn members of the public of dangers  
21 to health, safety, or significant economic harm is essential to protecting society's interests.  
22 Agency publicity can also advance the public interest by enabling consumers to make more  
23 informed decisions.

24 But, on the latter, agency publicity also has the potential to cause serious and  
25 sometimes unfair injury, particularly when it identifies and singles out specific persons or  
26 entities for criticism. Recommendation 73-1 defined "adverse agency publicity" as "statements  
27 made by an agency or its personnel which invite public attention to an agency's action or policy  
28 and which may adversely affect persons identified therein."<sup>2</sup> As Recommendation 73-1  
29 recognized, adverse agency publicity "is undesirable when it is erroneous, misleading or  
30 excessive or it serves no authorized agency purpose."<sup>3</sup>

31 Recommendation 73-1 responded to several well-known incidents in which adverse  
32 agency publicity issued through press releases caused significant harm to regulated parties.<sup>4</sup>  
33 The Administrative Conference called for agencies to adopt published rules requiring publicity  
34 to (1) be accurate and not disparaging, (2) announce investigations and other pending actions  
35 only in carefully prescribed circumstances, (3) fulfill an authorized purpose, (4) disclose when  
36 any information has a limited basis and give parties prior notice when practicable, and (5) be  
37 corrected or retracted when erroneous or misleading.<sup>5</sup> Some agencies implemented  
38 Recommendation 73-1 by adopting such rules; other agencies responded to the spirit of the  
39 Recommendation by adopting less formal internal policies to address these issues; and still  
40 other agencies took no action.

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<sup>2</sup> *Id.* Recommendation 73-1 distinguished agency publicity "from the mere decision to make records available to the public rather than preserve their confidentiality," as those decisions are governed by the criteria set forth in the Freedom of Information Act (FOIA), 5 U.S.C. § 552. To the extent that information is required to be disclosed by FOIA, this recommendation does not suggest withholding such information.

<sup>3</sup> Recommendation 73-1.

<sup>4</sup> *Id.*; *see also* NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 1 (September 25, 2015) (Report to the Administrative Conference of the United States) [hereinafter Cortez Report].

<sup>5</sup> Recommendation 73-1; Cortez Report, at 1.



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41 In light of subsequent developments, such as the emergence of agency web sites, social  
42 media, and searchable online databases as means for agencies to communicate with the public,  
43 the Conference commissioned a report to study modern agency publicity practices, identify  
44 new challenges, and advise how Recommendation 73-1 might be updated. The report found  
45 that the potential for adverse agency publicity to injure private parties has increased  
46 substantially with the rapid proliferation of new forms of communication, and that modern  
47 publicity has created both new policy and management challenges for agencies.<sup>6</sup> Most social  
48 media, for instance, are designed to generate information that can be accessed quickly and  
49 shared widely, increasing the risk that at least some important facts or nuances will be lost  
50 when information is disseminated. Social media can also create logistical hurdles for agencies,  
51 by making it more difficult for them to exercise control over the distribution and content of  
52 communications by individual employees regarding agency actions. A further complication  
53 arises from the ability of capital markets, now powered by the Internet, to respond more  
54 quickly to agency publicity, increasing the risk for potential damage to a company's reputation  
55 and share value, without regard to whether the contents of an initial communication are  
56 accurate or interpreted correctly.<sup>7</sup>

57 Another recent development that has the potential to increase the impact of adverse  
58 agency publicity on private parties is the proliferation of searchable online databases. Federal  
59 agencies now maintain an unknown but large number of searchable online databases that may  
60 contain negative information about regulated parties.<sup>8</sup> The use of such databases may extend  
61 back to 1986, when Congress required the Environmental Protection Agency (EPA) to establish  
62 a Toxic Release Inventory (TRI) to track chemical releases by facilities nationwide in a computer  
63 database accessible to any person.<sup>9</sup> Interest in using searchable online databases for  
64 regulatory purposes has only increased with recent "open government," "smart disclosure,"

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<sup>6</sup> See generally Cortez Report.

<sup>7</sup> See *id.* at 25.

<sup>8</sup> See *id.* at 18.

<sup>9</sup> See *id.* at 18-19. The TRI has been credited with having a significant impact on firm-level emissions and has inspired similar disclosure efforts internationally. See *id.*



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65 and “open data” initiatives, which urge agencies to “harness new technologies to put  
66 information about their decisions online and readily available to the public.”<sup>10</sup>

67 Online databases present special challenges because different agency databases are  
68 populated with different kinds of data, which require adoption of different standards to protect  
69 the various public and private interests potentially affected by these communications. Some  
70 databases include data reported by regulated parties, whereas others include data generated  
71 by agencies as part of their regulatory enforcement responsibilities or reported by third parties  
72 with varying degrees of quality control. The risk of publishing inaccurate adverse information  
73 about regulated parties may be greater when a database includes information produced by  
74 agencies or provided by third parties, than when information comes directly from the regulated  
75 entity.<sup>11</sup> Therefore, policies and best practices governing communications should be based on  
76 the nature of the database or databases maintained by the agency, rather than general rules  
77 that purportedly apply to all such databases.

78 Although a one-size-fits-all approach is not feasible, given the variety of searchable  
79 online databases, an agency’s policies governing databases can be informed by the experience  
80 of other agencies, as well as by congressional directives. For example, the Consumer Financial  
81 Protection Bureau (CFPB) publishes a consumer complaint database that allows consumers to  
82 submit complaints for various financial products.<sup>12</sup> The agency describes its procedures for  
83 publishing complaints in Policy Statements published in the Federal Register.<sup>13</sup> When the CFPB  
84 receives a consumer complaint, it authenticates the complaint to confirm a commercial  
85 relationship between the consumer and the company, and forwards the complaint to the

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<sup>10</sup> See *id.* at 19 (citing Memorandum on Transparency and Open Government, 74 Fed. Reg. 4683, 4685 (Jan. 21, 2009); Executive Office of the President, National Science and Technology Council, Smart Disclosure and Consumer Decisionmaking: Report of the Task Force on Smart Disclosure (May 2013), [http://www.whitehouse.gov/sites/default/files/microsites/ostp/report\\_of\\_the\\_task\\_force\\_on\\_smart\\_disclosure.pdf](http://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf)).

<sup>11</sup> See *id.* at 20.

<sup>12</sup> See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaint/>.

<sup>13</sup> See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (Jun. 22, 2012).



86 company, which can then respond with pre-set, “structured” responses.<sup>14</sup> For a complaint  
87 narrative to be published, the consumer must give consent, and personal information must be  
88 removed from the complaint.<sup>15</sup> The agency does not publish complaints that (1) lack critical  
89 information (2) have been referred to other agencies, (3) are duplicative, (4) would reveal trade  
90 secrets, (5) are fraudulently submitted, or (6) incorrectly identify the regulated entity.<sup>16</sup> The  
91 database also contains a disclaimer stating that the agency does not verify all of the facts  
92 alleged in complaints.<sup>17</sup> These procedures, described in more detail in the report  
93 commissioned by the Conference, can provide a useful body of experience that may be helpful  
94 to other agencies that are considering establishment of policies for public communications  
95 from similar databases.<sup>18</sup>

### The Information Quality Act

96 The report commissioned by the Conference also found that the Information Quality Act  
97 (IQA), enacted in 2001, could go a long way toward addressing the potential risks of adverse  
98 agency disclosures.<sup>19</sup> The IQA requires the Office of Management and Budget (OMB) to issue  
99 government-wide guidelines to ensure the quality, objectivity, utility, and integrity of  
100 information disseminated by agencies.<sup>20</sup> It also requires the OMB to establish administrative

**Commented [AO2]:** We say nothing about the growing role of the White House in agency publicity. Specifically, for some agencies, press releases are reviewed by the White House, and agency spokespersons are told not to answer questions without the approval of a political appointee. (And Congress recently stripped the confirmation requirement for Assistant Secs for Public Affairs.) The consultant’s report stresses the decentralization of agency publicity (or at least the growth in the number of sources of information). But there is also more centralization. Is it worth mentioning the White House’s role?

<sup>14</sup> See Cortez Report, note 4 at 62-68.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 64.

<sup>17</sup> See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaintdatabase/>.

<sup>18</sup> See Cortez Report, note 4 at 62-71. As noted, statutes can also provide guidance to agencies that maintain online databases. For example, the Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 (codified in various sections of 15 U.S.C.), requires the Consumer Product Safety Commission (CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer products. The statute requires the CPSC to provide clear and conspicuous notice to database users that the agency does not guarantee the accuracy, completeness, or adequacy of the contents of the database. 15 U.S.C. § 2055(b)(5). It also requires the CPSC to afford procedural protections to regulated parties, such as the opportunity to comment on reports and to request that comments be included in reports, and provides that the agency must consider objections that a report is materially inaccurate. *Id.*

<sup>19</sup> See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516.

<sup>20</sup> See *id.*



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101 mechanisms to allow affected persons to request correction of agency-disseminated  
102 information that does not meet the IQA's substantive standards.<sup>21</sup>

103 However, it is not clear whether the IQA applies to agency press releases. The IQA  
104 purports to apply broadly to "agency dissemination of public information, regardless of the  
105 form or format in which such information is disseminated."<sup>22</sup> But the OMB's guidelines  
106 implementing the IQA issued in 2002 exempt press releases, opinions, and adjudicative  
107 processes from the scope of the statute.<sup>23</sup> Many agencies have drafted their own guidelines to  
108 implement the IQA, but they have taken different approaches with respect to the press release  
109 exemption. Some agencies have narrowed that exemption to provide that the IQA applies to  
110 new substantive information in press releases not covered by previous information  
111 dissemination subject to the IQA; others have adopted a broad exemption for press releases.<sup>24</sup>  
112 Still others have not addressed the issue at all.<sup>25</sup> This variance in outcome has led to confusion  
113 regarding the scope of the press release exemption.

114 It is also not clear whether the IQA applies to searchable online databases, since the  
115 OMB's guidelines exempt opinions and adjudicative processes. As a result, many databases  
116 may be excluded from the scope of data quality protections.<sup>26</sup> Clarifying the scope of these  
117 exemptions to the IQA would provide a measure of predictability in an area that remains murky  
118 and subject to dispute; however, this issue falls outside the scope of the report commissioned  
119 by the Conference.

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<sup>21</sup> See *id.*

<sup>22</sup> 44 U.S.C. § 3504(d)(1).

<sup>23</sup> 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

<sup>24</sup> See Cortez Report, *supra* note 4, Appendix G.

<sup>25</sup> *Id.*

<sup>26</sup> Excluding agency databases from the purview of the IQA may be necessary when, for example, information is not being presented by the agency as objective and accurate (such as when a database contains information collected from third parties). Even in those circumstances procedures can be adopted to protect regulated parties. See *supra* (discussing procedures adopted by CFPB).



### Recommendation

- 120 1. *Written policies.* Agencies that issue adverse publicity should adopt written policies  
121 addressing the content and procedures for issuing agency announcements. These  
122 policies should include clear internal lines of responsibility for publishing information  
123 and safeguards to ensure the accuracy of agency statements. These policies should also  
124 address communications regarding the activities of the agency communicated by agency  
125 employees acting in their individual capacities.
- 126 2. *Social media.* Agencies that issue adverse publicity should adopt written policies  
127 governing social media. Agencies should incorporate into their social media policies  
128 best practices and procedures that apply to traditional types of agency publicity, as well  
129 as policies to ensure proper use of agency social media accounts.
- 130 3. *Database disclosures.* Agencies should adopt written policies governing online  
131 databases that contain adverse information about identified parties. Those policies  
132 should include best practices such as:
- 133 a. If the information is presented to the public as accurate and objective, agencies  
134 should ensure the accuracy and objectivity of such information.
- 135 b. If the information is not presented to the public as accurate and objective—such  
136 as databases of third party complaints—agencies should clearly disclaim the  
137 accuracy of the information, including a statement as to whether the  
138 information has been verified or authenticated by the agency.
- 139 c. Agencies should ensure that users are informed of the source(s), context, and  
140 any limitations on the information contained in the database.



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- 141 d. Agencies should ensure that subjects identified in the database are given the  
142 chance to post responses or request corrections or retractions, subject to  
143 reasonable exceptions in the public interest.
- 144 4. *Publication of policies.* Agencies should publish online their written policies governing  
145 communication of adverse publicity.
- 146 5. *Employee training.* Agencies should provide training to employees on their adverse  
147 publicity policies.
- 148 6. *Advanced notice.* Unless such notice would be impracticable or inconsistent with the  
149 nature of the proceeding, agencies should give advanced notice to subjects identified in  
150 adverse publicity, but only when the subject is not already aware of an ongoing agency  
151 action, such as in cases of fraud or during a public health emergency.
- 152 7. *Publicizing investigations, complaints, and other preliminary actions.* Unless otherwise  
153 directed by statute, agencies should not publicize the pendency of investigations  
154 directed at a member of the public or regulated entity, except in rare circumstances as  
155 required by the public interest, and should publicize complaints and other preliminary  
156 actions only with a clear explanation that the action is tentative and non-final.<sup>27</sup>
- 157 8. *Clarifying the Information Quality Act as to Press Releases.* OMB should clarify that the  
158 Information Quality Act applies to new substantive information in press releases that is  
159 not covered by previous information disseminated subject to that statute.

**Commented [A03]:** For reasons I articulated at our first meeting, I do not support the principle that agencies should consider market reactions – unless the statute requires them to.

<sup>27</sup> The Conference supports the principle that when practicable, not otherwise prohibited by statute, and subject to exceptions in the public interest, agencies with the relevant expertise should consider potential capital market reactions to their announcements and try to minimize potential market shocks. See Cortez Report, *supra* note 4, at 89. However, implementation of this principle is complicated by great increases in the speed of communication and trading, and the internationalization of financial markets to permit transactions on a 24 hour per day basis. Consideration of the practical steps necessary for agencies to implement this recommendation in light of these technological advances falls beyond the scope of the report and this project.





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- 160 9. *Clarifying the Information Quality Act as to Databases.* The OMB should consider  
161 updating its guidelines to account for the different types of databases published by  
162 agencies.
- 163 10. *Objections, corrections, and retractions.* Agencies that issue adverse agency publicity not  
164 subject to the Information Quality Act should adopt procedures for accepting and  
165 responding to objections to such publicity and for correcting and retracting materially  
166 inaccurate statements, subject to exceptions in the public interest. Agencies should  
167 inform regulated entities to submit their objections to a designated point of contact  
168 within the agency.

DRAFT