



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Disclosure of Agency Legal Materials

### Ad Hoc Committee

#### Proposed Recommendation for Plenary | June 15, 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.<sup>1</sup> 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),<sup>2</sup> the Federal  
7 Register Act,<sup>3</sup> and the E-Government Act of 2002.<sup>4</sup> 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.<sup>5</sup> The Conference has identified best practices that, in some cases, Congress  
15 could implement through legislative action.

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<sup>1</sup> 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.)

<sup>2</sup> 5 U.S.C. § 552.

<sup>3</sup> 41 U.S.C. Chapter 15.

<sup>4</sup> Pub. L. No. 107-347, 116 Stat. 2899 (2002).

<sup>5</sup> 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.<sup>6</sup>

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 and  
30 ongoing costs on agencies. At the same time, proactive disclosure of agency legal materials may  
31 save staff time or money through a reduction in the volume of FOIA requests or printing costs, or  
32 an increase in the speed with which agency staff will be able to respond to remaining FOIA  
33 requests. In assigning responsibilities for overseeing the development and implementation of the  
34 proactive disclosure plans and for overseeing the agency’s compliance with all legal  
35 requirements for the proactive disclosure of agency legal materials agencies may wish to  
36 consider existing officials and the potential for overlapping or shared responsibilities.<sup>7</sup>

37 This Recommendation should not be considered as an exhaustive catalog of useful  
38 reforms. For example, it does not address the exemptions to FOIA’s general disclosure  
39 requirements.<sup>8</sup> All records identified for proactive disclosure in this Recommendation would still  
40 be subject to the exemptions from FOIA, such that if a record were exempt from disclosure upon  
41 request, it would be exempt from any proactive disclosure requirement. Congress should also

**Commented [ST1]:** We agree that there will be up-front technical costs, operational burden, and agency budget impacts associated with both the proactive disclosures and recommended legal requirements and suggest that some of these costs will be ongoing. Did agencies express views on whether they have the capacity to make this kind of information available absent additional appropriations?

**Commented [ST2]:** Current-law FOIA, at 5 USC 552(j), states “Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level.)”, and directs the Chief FOIA Officer to have agency-wide responsibility for efficient and appropriate compliance with “this section” [the FOIA, including the proactive disclosure provisions.], among other FOIA-related responsibilities.

This recommended new officer has agency-wide responsibility for ensuring compliance with requirements to proactively disclose legal materials, including under FOIA 552(a)(2), as contemplated in Rec. 1. The contemplated new officer has substantial responsibilities which duplicate responsibilities already held by the Chief FOIA Officer, but each has responsibilities the other does not. The Chief FOIA Officer ensures compliance with non-proactive FOIA disclosures and proactive FOIA disclosures of non-legal materials and has other FOIA responsibilities, and the proposed new official ensures compliance with proactive disclosures of legal materials outside the FOIA context (including under the E-Government Act and the Federal Register Act, noted in lines 5-7) and develops the disclosure plans in Rec 3.a..

Agencies may wish to consider the overlapping and shared responsibilities of existing officials as they assign these new responsibilities.

<sup>6</sup> See generally Bell et al., *supra* note 1.

<sup>7</sup> For example, 5 USC 552(j), requires agencies to designate a Chief FOIA officer.

<sup>8</sup> 5 U.S.C. § 552(b).



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42 consider timeframes for implementation of the proactive disclosure recommendations, whether  
43 for newly created or preexisting agency legal materials.

44 Nothing in this Recommendation should be interpreted to constitute the Conference’s  
45 interpretation of the statutes governing the disclosure of agency legal materials. Any  
46 recommendation that a statutory provision be amended to “provide” something does not  
47 necessarily mean that the law does not already require it. Nor should this Recommendation be  
48 read as superseding the Conference’s many previous recommendations on the disclosure of  
49 agency legal materials. Unless and until Congress acts, the Conference encourages agencies to  
50 adopt the best practices identified in its many previous recommendations.

**RECOMMENDATION**

**Proactive Disclosure of Agency Legal Materials**

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



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- 68 e. Memoranda of understanding, memoranda of agreement, and other similar inter-  
69 agency or inter-governmental agreements that affect a member of the public;  
70 f. Any operative agency delegations of legal authority; and  
71 g. Any operative orders of succession for agency positions whose occupants must be  
72 appointed by the President with the advice and consent of the Senate.
- 73 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,  
74 pursuant to notice and receipt of public comment, except for good cause pursuant to 5  
75 U.S.C. § 553, providing that it will not proactively disclose some records described in  
76 paragraph 1 of this Recommendation, because individual records do not vary  
77 considerably in terms of their factual contexts or the legal issues they raise, or that  
78 proactive disclosure of such documents would be misleading. Any such rule should  
79 explain which records the agency will not proactively disclose and what other  
80 information (e.g., aggregate data, representative samples), if any, the agency will  
81 proactively disclose instead to adequately inform the public about agency activities.
- 82 3. Congress should require OMB to ensure that agencies to:  
83 a. develop and post disclosure plans—internal management plans and procedures for  
84 making legal materials available online on their websites; and  
85 b. designate an officer responsible for overseeing the development and  
86 implementation of the proactive disclosure plans described in paragraph 3(a), and  
87 for overseeing the agency’s compliance with all legal requirements for the  
88 proactive disclosure of agency legal materials.
- 89 4. Because various provisions of the E-Government Act, Public Law Number 107-347,  
90 governing proactive disclosure are duplicative, contain drafting errors, or are outdated,  
91 Congress should amend the statute to:  
92 a. Delete § 206(b);  
93 b. Delete “and (b)” in § 207(f)(1)(A)(ii);  
94 c. Eliminate references to the Interagency Committee on Government Information,  
95 which no longer exists. Congress should instead require that the Office of  
96 Management and Budget, after consultation with other relevant inter-agency

**Commented [ST3]:** Thank you for thinking of OMB but we recommend that the Conference revert to the more direct formulation that places responsibilities on the agencies this recommendation would seek to obligate. OMB is not currently well-situated to provide this oversight.

**Commented [ST4]:** Or officers?



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97 ~~bodies~~ the Federal Web Managers Council, update its guidance on federal agency  
98 public websites at least every two years periodically to ensure that agencies  
99 present legal materials as appropriate, on their websites in a clear, logical, and  
100 readily accessible fashion.  
101 5. Congress should provide that each agency should post each of its legislative rules on its  
102 website, and should, to the extent feasible, include links to related agency legal materials,  
103 such as guidance documents explaining the rule or significant adjudicative opinions  
104 interpreting or applying it.

**Enforcement of Proactive Disclosure Requirements**

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

**Official Edition of *Federal Register***

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

**Preparation of Proposed Legislation**

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

**Commented [ST5]:** Suggest referring to other relevant inter-agency bodies, as there are several with which OMB may consult (i.e., Federal Web Managers Council, federal Chief Information Officers Council, Federal Records Management Council, etc.) and as the relevant bodies may change and evolve over time.

**Commented [ST6]:** OMB seeks to update this guidance periodically, as needed.

**Commented [ST7]:** We recommend a qualifier to indicate that this is not all legal materials.

**Commented [ST8]:** Is this referring to regulatory text or also the preamble? Suggest that a link to the e-CFR and/or Federal Register notice (GovInfo?) should suffice.

**Commented [ST9]:** Certain already-existing records? Or certain categories of records, such that future-created records might be within the scope of the request? If the latter, how could an agency issue a final "determination" on the request if it is impossible to ever have fully discharged its obligations to the requester?