



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Disclosure of Agency Legal Materials

Ad Hoc Committee

Draft Recommendation for Committee | April 19, 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.¹ 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),² the Federal
7 Register Act,³ and the E-Government Act of 2002.⁴ 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.⁵ The Conference has identified best practices that, in some cases, Congress
15 could effectively implement through legislative action.

¹ 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.)

² 5 U.S.C. § 552.

³ 41 U.S.C. Chapter 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ 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 encountered problems—inconsistencies and uncertainties, for example—
18 that Congress could remedy through statutory reforms. Developed at different times and for
19 different 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.⁶

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 and where they must publish them—whether in the *Federal Register*, on their
29 websites, or elsewhere.⁷ The Conference recognizes that these statutory reforms would impose
30 additional upfront costs on agencies. Proactive disclosure of agency legal materials can save staff
31 time or money through a reduction in the volume of FOIA requests or printing costs, however, or
32 an increase in the speed with which agency staff will be able to respond to remaining FOIA
33 requests.

34 This Recommendation should not be considered as an exhaustive catalog of useful
35 reforms. For example, it does not address the exemptions to FOIA’s general disclosure
36 requirements.⁸ All reforms identified in this Recommendation should be interpreted in light of
37 FOIA’s current exemptions. Nor should this Recommendation be read as superseding the
38 Conference’s many previous recommendations on the disclosure of agency legal materials.
39 Unless and until Congress acts, the Conference encourages agencies to adopt the best practices
40 identified in its many previous recommendations.

⁶ See generally Bell et al., *supra* note 1.

⁷ Nothing in this Recommendation should be interpreted to constitute the Conference’s interpretation of the statutes governing the disclosure of agency legal materials. Any recommendation that a statutory provision be amended to “provide” something does not necessarily mean that the law does not already require it.

⁸ 5 U.S.C. § 552(b).



RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

- 41 1. Congress should amend 5 U.S.C. § 552(a)(2) to require, subject to paragraph 2 of this
- 42 Recommendation, that each agency make available on its website:
- 43 a. Final opinions and orders issued in adjudications that are regulated by 5 U.S.C.
- 44 § 554 and 556–557 or otherwise consist of a legally required evidentiary hearing.
- 45 Each agency should disclose any such opinion or order regardless of whether the
- 46 agency designates the opinion or order as precedential, published, or other similar
- 47 designation;
- 48 b. Written documents that communicate the agency’s decision not to enforce a legal
- 49 requirement against an individual or entity, such as decisions to grant an
- 50 individual or entity a waiver or exemption and advisory opinions that apply
- 51 generally applicable legal requirements to specific facts or explain how the
- 52 agency will exercise its discretion in particular cases;
- 53 c. Written opinions issued by its chief legal officer, acting under statutory or
- 54 delegated authority, that bind agency officials in the performance of their duties;
- 55 d. Settlement agreements to which the agency is a party;
- 56 e. Memoranda of understanding, memoranda of agreement, and other similar inter-
- 57 agency or inter-governmental agreements that affect a member of the public; and
- 58 f. Agency delegations of authority; and
- 59 g. Orders of succession for agency positions whose occupants must be appointed by
- 60 the President with the advice and consent of the Senate.
- 61 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,
- 62 pursuant to notice and receipt of public comment, providing that it will not proactively
- 63 disclose a category of records described in paragraph 1 of this Recommendation, because
- 64 individual records do not vary considerably in terms of their factual contexts or the legal
- 65 issues they raise. Any such rule should explain which records the agency will not
- 66 proactively disclose and what other information (e.g., aggregate data, representative

Commented [AHC1]: Comment from Government Member Helen Serassio and Designated Alternate Noelle Green:
This Recommendation should be narrowed to apply solely to orders in adjudicatory matters, which are subject to APA § 554, and only those informal adjudication orders that each agency concludes is of interest to the public.

Commented [AHC2]: Comment from Committee Member Burke Kappler:
Strike the language defining written enforcement orders to include decisions not to enforce.

Commented [AHC3]: Selected for further discussion.

Commented [AHC4]: Question for Committee: Should this be limited to settlement agreements in judicial proceedings, or all settlements to which an agency is a party (including those reached during administrative proceedings)? Should it include settlements related to agency management personnel (e.g., EEO settlements, union grievances, contract disputes)?

Commented [AHC5]: Comment from Committee Member Burke Kappler:
Provide exceptions for nonpublic MOUs, MOAs, and interagency agreements and/or reaffirm the applicability of FOIA exemption 7 as applied to these materials.

Commented [AHC6]: Suggested by Committee Member Bill Funk.

Commented [AHC7]: Comment from Committee Member Burke Kappler:
The requirement of notice-and-comment rulemaking to do this is particularly onerous.
The NLRB's comments also agreed with this point.

Commented [AHC8]: Question for Committee: Is this limited to the categories of documents described in paragraph 1, or should this option apply to 552(a)(2) more broadly?



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- 67 samples), if any, the agency will proactively disclose instead to adequately inform the
68 public about agency activities.
- 69 3. Congress should provide in 5 U.S.C. § 552 that agencies must develop and post on their
70 websites proactive disclosure plans—that is, internal management plans and procedures
71 for making legal materials available online.
- 72 4. Congress should require each agency to designate an officer responsible for overseeing
73 the development and implementation of the proactive disclosure plan described in
74 paragraph 3, and for overseeing the agency’s compliance with all legal requirements for
75 the proactive disclosure of agency legal materials.
- 76 5. Because various provisions of the E-Government Act, Public Law Number 107-347,
77 governing proactive disclosure are duplicative, contain drafting errors, or are outdated,
78 Congress should amend the statute to:
- 79 a. Delete § 206(b);
80 b. Delete “and (b)” in § 207(f)(1)(A)(ii);
81 c. Eliminate references to the Interagency Committee on Government Information,
82 which no longer exists. Congress should instead require that the Office of
83 Management and Budget, after consultation with the Federal Web Managers
84 Council, update its guidance on federal agency public websites at least every two
85 years to ensure that agencies present legal materials on their websites in a clear,
86 logical, and readily accessible fashion.
- 87 6. Congress should provide by statute that each agency should, to the extent feasible, post
88 each of its legislative rules on its website accompanied by links to any related agency
89 legal materials, such as guidance documents explaining the rule or significant
90 adjudicative opinions interpreting or applying it.
- 91 7. Congress should direct that the Attorney General make formal written opinions by the
92 Department of Justice’s Office of Legal Counsel available online.
- Enforcement of Proactive Disclosure Requirements**
- 93 8. Congress should provide that a person may use the process described in 5 U.S.C.
94 § 552(a)(3) to request that an agency proactively disclose certain records when the

Commented [AHC9]: Comment from Senior Fellow Alan Morrison:
Subject to 553? Also subject to judicial review or not?

Commented [AHC10]: Suggestion to remove this recommendation from Committee Member Burke Kappler.

Commented [AHC11]: Suggestions from Senior Fellow Alan Morrison:

"Except for formal opinions that are properly classified or are provided directly to the President or others reporting directly to the President, such formal opinions should be indexed and the index made publicly available in electronic format."

Alternative suggestion, modeled on other temporal restrictions under exemption 5:

"Absent exceptional circumstances [good cause], all formal OLC opinions other than those that remain properly classified or were provided directly to the President or others reporting directly to the President, shall be made public no later than five years after they are issued."

Commented [AHC12]: Selected for further discussion.



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95 agency is legally required to proactively disclose the records but has not done so.
96 Congress should provide that such a request qualifies for expedited processing under 5
97 U.S.C. § 552(a)(6)(E) and that, when such a request is made, the agency may not charge
98 search, duplication, or review fees under 5 U.S.C. § 552(a)(4)(A).
99 9. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an
100 agency has not proactively disclosed records when legally required to do so, a reviewing
101 court may order the agency to proactively disclose them in the manner required by law.
102 Congress should also provide that a requester must exhaust administrative remedies
103 required by 5 U.S.C. § 552 before filing a complaint in district court to compel an agency
104 to proactively disclose records.

Presidential Records

105 10. Congress should amend the Federal Register Act provision, 44 U.S.C. § 1505(a),
106 requiring *Federal Register* publication of certain presidential proclamations and
107 executive orders, to provide that written presidential directives, including amendments
108 and revocations, regardless of designation, should be published in the *Federal Register* if
109 they:
110 a. directly impose obligations on or alter rights of private persons or entities; or
111 b. direct agencies to consider or implement actions that impose obligations or alter
112 rights of private persons or entities.
113 11. Congress should clarify the President's authority to withhold from publication directives
114 that relate solely to the internal personnel rules and practices of the Executive Branch or
115 an agency.
116 12. Congress should also specify that such revised 44 U.S.C. § 1505(a) disclosure
117 requirements are subject to the exemptions set out in FOIA, including those found in
118 § 552(b)(1).
119 13. To maintain the originally intended congruence between the Presidential Records Act, 44
120 U.S.C. § 2201, and FOIA exemptions, Congress should amend 44 U.S.C. § 2204 to
121 eliminate language that tracks—or once tracked—FOIA exemptions, and instead
122 incorporate by reference those exemptions—specifically § 552(b)(1), (3), (4), and (6).

Commented [AHC13]: Comment from Committee Member Roxanne Rothschild:
What is the timeline for posting proactive disclosures after their creation that would result in a finding of non-compliance?

Commented [AHC14]: Comment from Committee Member Burke Kappler:
FTC opposes recommendation to require expedited processing or to disallow fees. If the agency did not affirmatively disclose something, then presumably then the agency had a reason/informed decision as to why affirmative disclosure was not warranted. Requiring expedited treatment and disallowing fees appears punitive to this judgment.

Commented [AHC15]: Comment from Senior Fellow Alan Morrison:
Should FOIA's strict time limits for requests for specific records apply?

Commented [COM16]: Selected for further discussion.

Commented [AHC17]: Comment from Senior Fellow Allison Zieve:
Would this narrow the scope of existing practice regarding disclosure of presidential executive orders and proclamations?

Commented [AHC18]: Comment from Senior Fellow Alan Morrison:

For example, President Trump issued many such orders that significantly affected the rights of federal employees. Why shouldn't all such orders be public? Those orders are very different from the kinds of orders etc. covered by exemption (2) to FOIA.

Commented [AHC19]: Comment from Senior Fellow Alan Morrison:
What about other exemptions?



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123 14. Congress should direct the Office of the Federal Register (OFR) to study how best to
124 organize presidential directives on the OFR website to make presidential directives of
125 interest easily ascertainable, such as by codifying them and making them full-text
126 searchable.

Official Edition of *Federal Register*

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

Preparation of Proposed Legislation

131 16. The Conference's Office of the Chair should prepare and submit to Congress proposed
132 statutory changes consistent with this Recommendation.

Commented [AHC20]: Comment from Committee Member Roxanne Rothschild:
We are concerned about many members of the public that do not have digital access. Although efforts are being made to bridge the digital divide, it is a long way from being resolved.