



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Disclosure of Agency Legal Materials

### Ad Hoc Committee

#### Draft Recommendation for Committee | May 10, 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 effectively implement through legislative action.

---

<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).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<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 and where they must publish them—whether in the *Federal Register*, on their  
29 websites, or elsewhere.<sup>7</sup> 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.<sup>8</sup> All records identified for proactive disclosure in this Recommendation would still  
37 be subject to the exemptions from FOIA, such that if a record were exempt from disclosure upon  
38 request, it would be exempt from any proactive disclosure requirement. Nor should this  
39 Recommendation be read as superseding the Conference’s many previous recommendations on  
40 the disclosure of agency legal materials. Unless and until Congress acts, the Conference  
41 encourages agencies to adopt the best practices identified in its many previous recommendations.

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

<sup>7</sup> 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.

<sup>8</sup> 5 U.S.C. § 552(b).



**RECOMMENDATION**

**Proactive Disclosure of Agency Legal Materials**

- 42 1. Congress should amend 5 U.S.C. § 552(a)(2) to clarify or require, subject to paragraph 2  
43 of this Recommendation, that each agency make available on its website:
- 44 a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C.  
45 § 554 and 556–557 or otherwise issued after a legally required opportunity for an  
46 evidentiary hearing. Each agency should proactively disclose any such opinion or  
47 order regardless of whether the agency designates the opinion or order as  
48 precedential, published, or other similar designation;
  - 49 b. Written documents that communicate to a member of the public the agency’s  
50 decision not to enforce a legal requirement against an individual or entity, such as  
51 decisions to grant an individual or entity a waiver or exemption and advisory  
52 opinions that apply generally applicable legal requirements to specific facts or  
53 explain how the agency will exercise its discretion in particular cases;
  - 54 c. Written legal opinions and memoranda issued by or under the authority of its  
55 chief legal officers that bind agency officials as a matter of law in the  
56 performance of their duties;
  - 57 d. Settlement agreements to which the agency is a party;
  - 58 e. Memoranda of understanding, memoranda of agreement, and other similar inter-  
59 agency or inter-governmental agreements that affect a member of the public; and
  - 60 f. Any operative agency delegations of legal authority; and
  - 61 g. Any operative orders of succession for agency positions whose occupants must be  
62 appointed by the President with the advice and consent of the Senate.
- 63 2. Congress should provide in 5 U.S.C. § 552 that an agency may promulgate regulations,  
64 pursuant to notice and receipt of public comment, except for good cause pursuant to 5  
65 U.S.C. § 553, providing that it will not proactively disclose some records described in  
66 paragraph 1 of this Recommendation, because individual records do not vary  
67 considerably in terms of their factual contexts or the legal issues they raise. Any such rule  
68 should explain which records the agency will not proactively disclose and what other



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 69 information (e.g., aggregate data, representative samples), if any, the agency will  
70 proactively disclose instead to adequately inform the public about agency activities.
- 71 3. Congress should require OMB to ensure that agencies:
- 72 a. develop and post disclosure plans—that is, internal management plans and  
73 procedures for making legal materials available online on their websites; and  
74 b. designate an officer responsible for overseeing the development and  
75 implementation of the proactive disclosure plan described in paragraph 3(a), and  
76 for overseeing the agency’s compliance with all legal requirements for the  
77 proactive disclosure of agency legal materials.
- 78 4. Because various provisions of the E-Government Act, Public Law Number 107-347,  
79 governing proactive disclosure are duplicative, contain drafting errors, or are outdated,  
80 Congress should amend the statute to:
- 81 a. Delete § 206(b);  
82 b. Delete “and (b)” in § 207(f)(1)(A)(ii);  
83 c. Eliminate references to the Interagency Committee on Government Information,  
84 which no longer exists. Congress should instead require that the Office of  
85 Management and Budget, after consultation with the Federal Web Managers  
86 Council, update its guidance on federal agency public websites at least every two  
87 years to ensure that agencies present legal materials on their websites in a clear,  
88 logical, and readily accessible fashion.
- 89 5. Congress should provide by statute that each agency should post each of its legislative  
90 rules on its website, and should, to the extent feasible, include links to related agency  
91 legal materials, such as guidance documents explaining the rule or significant  
92 adjudicative opinions interpreting or applying it.
- 93 ~~6.—Congress should direct that the Attorney General make formal written opinions by the~~  
94 ~~Department of Justice’s Office of Legal Counsel available online.~~
- Enforcement of Proactive Disclosure Requirements**
- 95 7.6. Congress should provide that a person may use the process described in 5 U.S.C.  
96 § 552(a)(3) to request that an agency proactively disclose certain records when the

**Commented [AHC1]:** 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 [COM2]:** 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?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

97 agency is legally required to proactively disclose the records but has not done so.  
 98 Congress should provide that such a request qualifies for expedited processing under 5  
 99 U.S.C. § 552(a)(6)(E) and that, when such a request is made, the agency may not charge  
 100 search, duplication, or review fees under 5 U.S.C. § 552(a)(4)(A).  
 101 ~~8.~~7. Congress should provide in 5 U.S.C. § 552(a)(4) that when a district court finds that an  
 102 agency has not proactively disclosed records when legally required to do so, a reviewing  
 103 court may order the agency to proactively disclose them in the manner required by law.  
 104 Congress should also provide that a requester must exhaust administrative remedies  
 105 required by 5 U.S.C. § 552 before filing a complaint in district court to compel an agency  
 106 to proactively disclose records.

**Commented [COM3]:** 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 [AHC4]:** Comment from Senior Fellow Alan Morrison:  
 Should FOIA's strict time limits for requests for specific records apply?

**Presidential Records**

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

**Official Edition of *Federal Register***

129 ~~14.8.~~ Congress should provide that the online version of the *Federal Register*, which is  
130 currently an unofficial informational resource, is the official edition of the *Federal*  
131 *Register* and eliminate any statutory requirement in 44 U.S.C. Chapter 15 or elsewhere  
132 that the printed version of the *Federal Register* is the official edition.

**Preparation of Proposed Legislation**

133 ~~15.9.~~ The Conference's Office of the Chair should prepare and submit to Congress  
134 proposed statutory changes consistent with this Recommendation.