



## Public Access to Agency Adjudicative Proceedings

### Committee on Adjudication

#### Proposed Recommendation for Committee | October 19, 2021

1 [Preamble]

**Commented [JG1]:** A draft preamble will be circulated prior to the Committee's November 12 meeting.

#### RECOMMENDATION

##### Objectives of Public Access to Agency Adjudicative Proceedings

- 2 1. Agencies should identify the objectives of public access to adjudicative proceedings and  
3 design policies to serve them. When identifying the objectives of public access and  
4 designing rules and policies to serve those objectives, agencies should be attentive to  
5 constitutional requirements for public access and any applicable statutory requirements,  
6 including those relating to the disclosure or nondisclosure of certain types of information.

**Commented [JG2]:** The preamble will provide background on different objectives of public access (see draft report for more information).

##### Policies for Public Access to Agency Adjudicative Proceedings

- 7 2. Agencies should promulgate and publish procedural regulations governing public access  
8 to adjudicative proceedings in the *Federal Register* and codify them in the *Code of*  
9 *Federal Regulations*. These regulations should cover all significant matters pertaining to  
10 public access to adjudicative proceedings, including the following:  
11 a. Standards for determining which proceedings are presumptively open or closed to  
12 public observation and any circumstances in which adjudicators may or must  
13 depart from that presumption in individual cases;  
14 b. The manners in which members of the public ordinarily can observe open  
15 proceedings, for example by attending in person at a specific location (e.g., at an  
16 agency office) or by remote means (e.g., online or by telephone);



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- 17 c. Requirements, if any, for advance public notice of proceedings; and  
18 d. The public availability of and means of accessing transcripts and recordings of  
19 proceedings.
- 20 3. Agencies should develop guidelines that explain, in plain language:
- 21 a. When adjudicative proceedings are open and closed to public observation under  
22 the procedural regulations recommended in paragraph 2;
- 23 b. Where and how members of the public can observe open proceedings;
- 24 c. Whether members of the public need to register before attending open  
25 proceedings;
- 26 d. Any expectations for decorum by public observers at open proceedings (e.g.,  
27 regarding the use of electronic devices and audiovisual equipment);
- 28 e. Whom members of the public should contact if they have questions about  
29 observing proceedings;
- 30 f. Instructions for accessing agency or non-agency facilities at which members of  
31 the public can observe open proceedings;
- 32 g. Instructions for reporting on proceedings (e.g., information about media inquiries  
33 and use of audiovisual equipment); and
- 34 h. Policies for managing proceedings that attract high levels of public interest.
- 35 4. Agencies should publish the regulations described in paragraph 2, the guidelines  
36 described in paragraph 3, and any other information about public access to adjudicative  
37 proceedings, in an appropriate location on their websites.

### **Standards and Procedures for Determining Which Adjudicative Proceedings Are Open or Closed**

- 38 5. Agencies should adopt the presumption that evidentiary hearings and appellate  
39 proceedings (including oral argument) are open to public observation and may be closed,  
40 in whole or in part, only to the extent necessary to protect one or more of the following  
41 interests::
- 42 a. National security;



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- 43           b. Law enforcement interests;  
44           c. Confidential business information;  
45           d. Participants' privacy; or  
46           e. Other interests or categories of information protected by law.

47 For programs in which it is likely that the need to protect one or more of these interests or  
48 categories of information will ordinarily outweigh the public interest in open  
49 proceedings, it may be appropriate to adopt the presumption that evidentiary hearings and  
50 appellate proceedings are closed to public observation while retaining the ability to open  
51 these proceedings, in whole or in part, in particular cases or to particular individuals.

- 52 6. Agencies should consider whether types of adjudicative proceedings **other than**  
53 **evidentiary hearings and appellate proceedings** should be presumptively open or closed to  
54 public observation, while retaining the ability to depart from that presumption in  
55 particular cases. In developing policies regarding public access to particular types of  
56 proceedings other than evidentiary hearings and appellate proceedings, agencies should  
57 consider, at a minimum, the following:

- 58           a. Whether public access to proceedings of that type would promote important  
59           policy objectives such as transparency, fairness to parties, accurate and efficient  
60           development of records for decisionmaking, or public participation;  
61           b. Whether public access to proceedings of that type would impede important policy  
62           objectives such as encouraging candor, achieving consensus, deciding cases and  
63           resolving disputes in an efficient manner, preventing intimidation or harassment  
64           of participants, avoiding unwarranted reputational harm to participants, or  
65           protecting national security, law enforcement, confidentiality of business  
66           documents, participants' privacy, or other interests or categories of information  
67           protected by law;  
68           c. Whether proceedings of that type or a broader adjudication process includes  
69           opportunities for public access;  
70           d. Whether there is often public interest in observing proceedings of that type;  
71           e. Whether matters to be discussed at proceedings of that type ordinarily involve

**Commented [JG3]:** The preamble will define "adjudicative proceedings" and provide examples of proceedings other than evidentiary hearings and appellate proceedings that agencies conduct in the course of adjudications (e.g., prehearing conferences, settlement conferences).



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- 72 issues of broad public interest or the interests of persons beyond the parties; and  
73 f. Whether members of the public can easily inspect or obtain copies of transcripts,  
74 recordings, or summaries of proceedings of that type.
- 75 7. Agencies should consider the process for departing from a presumption of open or closed  
76 proceedings in particular cases. Agencies should consider addressing the following topics  
77 in procedural regulations:
- 78 a. How parties to a case can request that proceedings that are presumptively open to  
79 public observation be closed or that proceedings that are presumptively closed to  
80 public observation be open to particular individuals or the general public;
  - 81 b. How individuals who are not parties to a case can request access, for themselves  
82 or the general public, to proceedings that are presumptively closed to public  
83 observation;
  - 84 c. Who can respond or object to requests regarding public access, and how such  
85 requests should be made;
  - 86 d. Whether adjudicators or other agency officials can, on their own motion, close  
87 proceedings that are presumptively open to public observation or open  
88 proceedings that are presumptively closed to public observation;
  - 89 e. Whether and how adjudicators or other agency officials must document and notify  
90 participants about decisions regarding public access; and
  - 91 f. Who, if anyone, can appeal decisions regarding public access and, if so, when,  
92 how, and to whom they may do so.

### **Manner of Public Observation of Open Adjudicative Proceedings**

- 93 8. When adjudicators conduct open proceedings in public hearing rooms, members of the  
94 public should have the opportunity to observe the proceedings from the rooms in which  
95 they are conducted subject to reasonable security protocols, resource and space  
96 constraints, and concerns about disruptions.
- 97 9. Agencies should provide members of the public the opportunity to observe open  
98 adjudicative proceedings remotely, such as by providing a dial-in number or



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99 livestreaming audio or video of the proceedings online. Agencies should structure remote  
100 access in a way that avoids disruptions, such as by ensuring that public observers who are  
101 not entitled to participate in proceedings can only observe them and cannot interact with  
102 participants or other observers by unmuting themselves, sharing visual content or  
103 annotating shared documents, or using chat or file sharing features common in internet-  
104 based videoconferencing software.

105 10. Agencies should consider whether interested members of the public, communities, and  
106 organizations are likely to encounter any barriers to accessing open adjudicative  
107 proceedings. Agencies should consider, for example, whether any measures are needed to  
108 accommodate people for whom it may be difficult to make arrangements to travel to  
109 locations where proceedings are conducted or obtain access to electronic devices or  
110 private internet services necessary to observe proceedings remotely, and whether security  
111 protocols at the facilities where proceedings are conducted or other factors make in-  
112 person attendance difficult or impractical.

### **Advance Public Notice of Open Adjudicative Proceedings**

113 11. Agencies should consider whether it would be beneficial to provide advance public notice  
114 of open adjudicative proceedings and publicize them. Agencies that determine that  
115 advance public notice would be beneficial should consider (a) the best places and  
116 publications for providing such notice, (b) the information provided in the notice, and (c)  
117 the timing of the notice. Agencies that regularly conduct open proceedings should also  
118 consider maintaining a schedule of and information about upcoming proceedings in an  
119 appropriate location on their websites.

120 12. To determine the best places and publications for providing advance public notice of  
121 open adjudicative proceedings, agencies should consider their needs and available  
122 resources and the individuals, communities, and organizations that are likely to be  
123 interested in or affected by such proceedings. Places and publications where agencies can  
124 provide public notice of open proceedings include:

125 a. *The Federal Register*;



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- 126           b. A press release, digest, newsletter, or blog post published by the agency;  
127           c. An agency events calendar;  
128           d. Social media;  
129           e. A newspaper or other media outlet that members of the public who may be  
130           interested in observing the proceeding are likely to monitor;  
131           f. A physical location that potentially interested members of the public are likely to  
132           see (e.g., a bulletin board at a jobsite or agency office);  
133           g. An email sent to persons who have subscribed to a mailing list or otherwise opted  
134           to receive updates about a particular adjudication; or  
135           h. A communication sent directly to members of the public, communities, and  
136           organizations who may be interested in observing the proceeding.
- 137   13. Agencies should include the following information in any public notice for an open  
138   adjudicative proceeding, as applicable:
- 139           a. The name and docket number or other identification for the proceeding;  
140           b. The date and time of the proceeding;  
141           c. The ways that members of the public can observe the proceeding, along with any  
142           requirements for registering or requesting access to the proceeding and, for in-  
143           person observers, instructions for accessing the facility where the proceeding will  
144           take place;  
145           d. A brief summary of the proceeding's purpose; and  
146           e. Contact information for a person who can answer questions about the proceeding.
- 147   14. Agencies should determine the appropriate timing for providing public notice of open  
148   adjudicative proceedings given the nature of their programs and the proceeding at issue.  
149   More advance notice may be warranted, for example, if there is likely to be significant  
150   public interest in a proceeding and interested members of the public will need to travel to  
151   observe it..

### **Public Access to Transcripts and Recordings of Adjudicative Proceedings**

- 152   15. Consistent with applicable constitutional and statutory requirements and the objectives



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- 153 identified in paragraph 1, agencies should consider whether and how they make  
154 transcripts and recordings of adjudicative proceedings available to interested members of  
155 the public. To provide public access to such records, an agency can, for example:
- 156 a. Post transcripts and recordings in an appropriate location on their websites, for  
157 example in an electronic docket system;
  - 158 b. Make transcripts and recordings available for public inspection on a website not  
159 controlled by the agency, such as a public video sharing website, but only after  
160 carefully weighing the costs and benefits of doing so;
  - 161 c. Make transcripts and recordings available for public inspection in a reading room,  
162 docket office, or other agency facility;
  - 163 d. Provide copies of transcripts and recordings on request, at no cost to the requestor  
164 or for a fee established by a rule published consistent with the Freedom of  
165 Information Act; or
  - 166 e. Arrange for court reporters who transcribe or record proceedings under contract  
167 with the government to provide copies of such records on request, at no cost to the  
168 requestor or for a fee that fairly represents the costs to and services provided by  
169 the contractor.
- 170 16. Agencies should take steps to redact any information that is protected by law or policy  
171 from public disclosure before providing public access to transcripts and recordings.