



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Public Access to Agency Adjudicative Proceedings

Committee on Adjudication

Proposed Recommendation for Committee | November 12, 2021

1 Agencies adjudicate millions of cases each year. The matters they adjudicate are diverse,
2 as are the processes they use to do so. Some processes are trial-like; others are informal. Some
3 are adversarial; others are non-adversarial. Agencies conduct many different types of
4 proceedings in the course of adjudicating cases, such as evidentiary hearings, appellate
5 arguments, investigatory hearings, prehearing and scheduling conferences, and settlement
6 conferences. Members of the public—participants’ family and friends, media representatives,
7 representatives of non-governmental organizations, researchers, and others—may seek to
8 observe adjudicative proceedings for any number of reasons.

9 Agencies must determine whether and how to allow public access to the proceedings they
10 conduct. The Constitution and federal statutes establish the basic parameters for that
11 determination. The Supreme Court has interpreted the First Amendment to provide a general
12 right of public access to judicial proceedings,¹ and a number of federal courts have held that the
13 same right extends to at least some proceedings conducted by administrative agencies.² Federal
14 statutes, such as the Government in the Sunshine Act³ and certain statutes specific to particular
15 programs and agencies, require that agencies open or close certain adjudicative proceedings to
16 public observation. Agencies may need to transcribe or record certain adjudicative proceedings

¹ Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Superior Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980).

² See Jeremy Graboyes & Mark Thomson, Public Access to Agency Adjudicative Hearings 10–12 (Oct. 15, 2021) (draft report to the Admin. Conf. of the U.S.).

³ 5 U.S.C. § 552b.



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17 and may be required, under the Federal Advisory Committee Act⁴ or other laws, to make such
18 records publicly available. Conversely, the Freedom of Information Act,⁵ the Privacy Act,⁶ and
19 other laws and executive-branch policies may require agencies to protect sensitive interests and
20 information.

21 On top of these constitutional and statutory requirements, many agencies have adopted
22 their own policies regarding public access to adjudicative proceedings.⁷ Settling on a sound
23 policy for determining which proceedings should be open to public observation can require a
24 careful balancing of different, and sometimes conflicting, interests. Proceedings open to public
25 observation promote transparency, public accountability, and public understanding of agency
26 decision making. Openness encourages fair process for private parties and promotes accurate and
27 efficient decision making by subjecting arguments and evidence to public scrutiny. And many
28 participants, especially self-represented parties, people with disabilities, and children, benefit
29 from having a family member, friend, personal care attendant, case worker, or other supportive
30 member of the public present at their proceedings.

31 There can, however, be drawbacks to opening adjudicative proceedings to the public.
32 Many adjudications involve sensitive information that would be publicly disclosed in an open
33 proceeding. Public disclosure of unverified information or unproven allegations may result in
34 unwarranted reputational harm to private parties. Just as open proceedings allow family members
35 and other supportive members of the public to accompany participants, they also allow in those
36 who would intimidate or harass. Openness may also affect the dynamic of agency proceedings,
37 leaving them vulnerable to disruption or leading them to become unduly adversarial or
38 protracted. There can also be administrative costs associated with facilitating in-person or remote

⁴ 5 U.S.C. App. 11. Although the Federal Advisory Committee Act principally governs the operation of advisory committees, section 11 of the Act requires agencies to “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” 5 U.S.C. App. 11(a). “Agency proceedings” means agency processes for rulemaking, adjudication, and licensing. *Id.* 11(b).

⁵ *Id.* § 552.

⁶ *Id.* § 552a.

⁷ See Graboyes & Thomson, *supra* note 2.



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39 observation of adjudicative proceedings by members of the public, providing advance public
40 notice of open proceedings, and providing access to transcripts and recordings of open
41 proceedings. These costs may be warranted in some circumstances but not others.

42 This Recommendation recognizes that agency adjudicative proceedings vary widely in
43 their purpose, complexity, and governing law and the degree of public interest they attract. It also
44 recognizes that not all agencies can bring the same resources to bear in addressing public access
45 to their adjudicative proceedings. In offering these best practices, the Administrative Conference
46 encourages agencies to develop policies that comply with all relevant constitutional and statutory
47 requirements for public access; recognize the benefits of public access for members of the
48 public, private parties, agencies, and other participants; and account for any countervailing
49 interests, such as privacy and confidentiality.

RECOMMENDATION

Policies for Public Access to Agency Adjudicative Proceedings

- 50 1. Agencies should promulgate and publish procedural regulations governing public access
51 to their adjudicative proceedings in the *Federal Register* and codify them in the *Code of*
52 *Federal Regulations*. In formulating these regulations, agencies should [be attentive](#)
53 [to adhere to](#) any constitutional or statutory requirements for public access and consider the
54 benefits of public access and countervailing interests, such as privacy and confidentiality,
55 as elaborated below. These regulations should, as spelled out in detail below, include the
56 following:
- 57 a. A list of proceedings that should be categorically or presumptively open or
58 closed, and standards for determining when adjudicators may or must depart from
59 such presumption in individual cases (see Paragraphs 4–6);
 - 60 b. The manners in which members of the public can observe open proceedings, for
61 example by attending in person (e.g., at an agency office) or by remote means
62 (e.g., online or by telephone) (see Paragraphs 7–9);
 - 63 c. Requirements, if any, for advance public notice of [proceedings](#) (see Paragraphs

Commented [A1]: For Committee review: Should this be “proceedings” or “open proceedings”? (Note: The Sunshine Act requires advance notice of closed meetings.)



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- 64 10–13); and
- 65 d. The public availability of and means of accessing transcripts and audio and video
- 66 recordings of **proceedings** (see Paragraphs 14–16).
- 67 2. In conjunction with such regulations, agencies should develop guidelines that set forth, in
- 68 plain language:
- 69 a. Where and how agencies will communicate the schedule of open proceedings to
- 70 the public;
- 71 b. Where and how members of the public can observe open proceedings;
- 72 c. Whether members of the public need to register before attending open
- 73 proceedings and [information on how to register how they should do so](#);
- 74 d. Whom members of the public should contact if they have questions about
- 75 observing open proceedings;
- 76 e. Instructions for accessing agency or non-agency facilities at which members of
- 77 the public can observe open proceedings;
- 78 f. Any requirements for conduct by public observers at open proceedings (e.g.,
- 79 regarding the possession and use of electronic devices);
- 80 g. Protocols for facilitating media coverage of open proceedings; and
- 81 h. Policies for managing open proceedings that attract high levels of public interest.
- 82 3. Agencies should post the regulations described in Paragraph 1, the guidelines described
- 83 in Paragraph 2, and any other information about public access to adjudicative
- 84 proceedings, in an appropriate location on their websites.

Commented [A2]: For Committee review: Should this be “proceedings” or “open proceedings”? (Note: Information-disclosure laws don’t speak in terms of “open” proceedings, just records generally.)

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

- 85 4. Agencies should adopt the presumption that evidentiary hearings and appellate
- 86 proceedings (including oral argument) are open to public observation and may be closed,
- 87 in whole or in part, only to the extent consistent with the First Amendment and other
- 88 potential constitutional [and statutory](#) bases for requiring open proceedings, and only to
- 89 the extent necessary to protect a compelling interest such as:



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- 90 a. National security;
- 91 b. Law enforcement interests;
- 92 c. ~~Confidential business information~~Confidentiality of sensitive business
- 93 information;
- 94 d. Participants' privacy;
- 95 e. The interests of Minors ~~minors or and~~ juveniles; or
- 96 f. Other ~~categories of information~~interests protected by statute or regulation.
- 97 ~~For In some~~ programs, in which it is may be likely that the need to protect one or more of
- 98 these interests or categories of information will ordinarily outweigh the public interest in
- 99 open proceedings. ~~For such programs,~~ agencies may presume that evidentiary hearings
- 100 and appellate proceedings will be closed to public observation while retaining the ability
- 101 to open these proceedings, in whole or in part, in particular cases or to particular
- 102 individuals.
- 103 5. Agencies should consider whether types of adjudicative proceedings other than
- 104 evidentiary hearings and appellate proceedings (e.g., prehearing conferences) that are
- 105 typically closed should be open to public observation. In doing so, developing policies
- 106 regarding public access to particular types of proceedings other than evidentiary hearings
- 107 and appellate proceedings, agencies should adhere to the First Amendment, Due Process
- 108 Clause, and other applicable constitutional or statutory provisions and consider, at a
- 109 minimum, the following:
- 110 ~~a. Whether the First Amendment, the due process clause, or other constitutional~~
- 111 ~~provisions require open or closed proceedings;~~
- 112 b.a. Whether public access to proceedings of that type would promote important
- 113 policy objectives such as transparency, fairness to parties, accurate and efficient
- 114 development of records for decisionmaking, or public participation;
- 115 e.b. Whether public access to proceedings of that type would impede important policy
- 116 objectives such as encouraging candor, achieving consensus, deciding cases and
- 117 resolving disputes in an efficient manner, preventing intimidation or harassment
- 118 of participants, avoiding unwarranted reputational harm to participants, or



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119 protecting national security, law enforcement, confidentiality of sensitive business
120 documents information, participants' privacy, the interests of minors and
121 juveniles, and other similarly compelling interests, ~~or categories of information~~
122 protected by statute or regulation;

123 ~~d.c.~~ Whether proceedings of that type or the broader adjudication process of which the
124 proceeding at issue is a part typically includes opportunities for public access;

125 ~~e.d.~~ Whether there is often public interest in observing proceedings of that type;

126 ~~f.c.~~ Whether matters to be discussed at proceedings of that type ordinarily involve
127 issues of broad public interest or the interests of persons beyond the parties; and

128 ~~g.f.~~ Whether members of the public can easily inspect or obtain copies of transcripts,
129 recordings, or summaries of proceedings of that type.

- 130 6. Agencies should ~~consider the process~~ adopt processes for departing from or considering
131 requests to depart from a presumption of open or closed proceedings in particular cases.
132 Agencies should consider addressing the following topics in the procedural regulations
133 described in Paragraph 1:

- 134 a. How parties to a case can request that proceedings that are presumptively open to
135 public observation be closed or that proceedings that are presumptively closed to
136 public observation be open to particular individuals or the general public;
- 137 b. How non-parties to a case can request access, for themselves or the general
138 public, to proceedings that are presumptively closed to public observation;
- 139 c. How individuals can respond or object to requests regarding public access made
140 in subparagraphs (a) or (b) ~~of this paragraph~~;
- 141 d. Under what circumstances adjudicators or other agency officials can, on their own
142 motion, close proceedings that are presumptively open to public observation or
143 open proceedings that are presumptively closed to public observation;
- 144 e. Whether and how adjudicators or other agency officials must document and notify
145 participants about decisions regarding public access; and
- 146 f. Who, if anyone, can appeal decisions regarding public access and, if so, when, to
147 whom, and how, ~~and to whom~~ they may do so.



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Manner of Public Observation of Open Adjudicative Proceedings

- 148 7. When adjudicators conduct open proceedings in public hearing rooms, members of the
149 public should have the opportunity to observe the proceedings from the rooms in which
150 they are conducted, subject to reasonable security protocols, resource and space
151 constraints, and concerns about disruptions.
- 152 8. ~~Agencies~~ ~~agencies~~ should, when it would serve the public interest, consider ~~provide~~
153 ~~providing~~ members of the public the opportunity to observe open adjudicative
154 proceedings remotely, such as by providing a dial-in number or livestreaming audio or
155 video of the proceedings online. Agencies should structure remote access in a way that
156 avoids disruptions, such as by ensuring that public observers who are not entitled to
157 participate in proceedings can only observe them and cannot interact with participants or
158 other observers by unmuting themselves, sharing visual content or annotating shared
159 documents, or using chat or file sharing features common in internet-based
160 videoconferencing software.
- 161 9. Agencies should consider whether interested members of the public, ~~communities, and~~
162 ~~organizations~~ are likely to encounter any barriers to accessing open adjudicative
163 proceedings. Agencies should consider, for example, whether any measures are needed to
164 accommodate people ~~with disabilities, people~~ for whom it may be difficult to make
165 arrangements to travel to locations where proceedings are conducted, ~~and people who do~~
166 ~~not have or obtain~~ access to electronic devices or private internet services necessary to
167 observe proceedings remotely, ~~Agencies should also consider and~~ whether security
168 protocols at the facilities where proceedings are conducted or other factors make in-
169 person attendance difficult or impractical.

Commented [A3]: To be addressed at outset of 11/12 meeting.

Advance Public Notice of Open Adjudicative Proceedings

- 170 10. Agencies should consider whether it would be beneficial to provide advance public notice
171 of open adjudicative proceedings and publicize them. Agencies that determine that
172 advance public notice would be beneficial should consider (a) the best places and



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173 publications for providing such notice, (b) the information provided in the notice, and (c)
174 the timing of the notice. Agencies that regularly conduct open proceedings should also
175 consider maintaining a schedule of and information about upcoming proceedings in an
176 appropriate location on their websites.

177 11. To determine the best places and publications for providing advance public notice of
178 open adjudicative proceedings, agencies should consider their needs and available
179 resources and the individuals, communities, and organizations that are likely to be
180 interested in or affected by such proceedings. Places and publications where agencies can
181 provide public notice of open proceedings include:

- 182 a. The *Federal Register*;
- 183 b. A press release, digest, newsletter, or blog post published by the agency;
- 184 c. An agency events calendar;
- 185 d. Social media;
- 186 e. A newspaper or other media outlet that members of the public who may be
187 interested in observing the proceeding are likely to monitor;
- 188 f. A physical location that potentially interested members of the public are likely to
189 see (e.g., a bulletin board at a jobsite or agency office);
- 190 g. An email sent to persons who have subscribed to a mailing list or otherwise opted
191 to receive updates about a particular adjudication; or
- 192 h. A communication sent directly to members of the public, communities, and
193 organizations who may be interested in observing the proceeding.

194 12. Agencies should include the following information in any public notice for an open
195 adjudicative proceeding, as applicable:

- 196 a. The name and docket number or other ~~identifeation~~identifying information for
197 the proceeding;
- 198 b. The date and time of the proceeding;
- 199 c. The ways that members of the public can observe the proceeding, along with any
200 requirements for registering or requesting access to the proceeding and, for in-
201 person observers, instructions for accessing the facility where the proceeding will



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- 202 take place;
 - 203 d. A brief summary of the proceeding’s purpose; ~~and~~
 - 204 e. Contact information for a person who can answer questions about the proceeding;
 - 205 and
 - 206 e.f. COVID-19 protocols and disability accommodations.
- 207 13. Agencies should determine the appropriate timing for providing public notice of open
- 208 adjudicative proceedings given the nature of their programs and the proceeding at issue.
- 209 More advance notice may be warranted, for example, if there is likely to be significant
- 210 public interest in a proceeding and interested members of the public will need to travel to
- 211 observe it.

Commented [A4]: Comment from Alex Manuel (10/19/21).

Public Access to Transcripts and Recordings of Adjudicative Proceedings

- 212 14. Consistent with applicable constitutional and statutory requirements and the objectives
- 213 identified in paragraph 1, agencies should consider whether and how they make
- 214 transcripts and recordings of adjudicative proceedings available to interested members of
- 215 the public. To provide public access to such records, an agency can, for example:
- 216 a. Post transcripts and recordings in an appropriate location on ~~their-its~~ websites, for
 - 217 example in an electronic docket system;
 - 218 b. Make transcripts and recordings available for public inspection on a website not
 - 219 controlled by the agency, such as a public video sharing website, but only after
 - 220 carefully weighing the costs and benefits of doing so;
 - 221 c. Make transcripts and recordings available for public inspection in a reading room,
 - 222 docket office, or other agency facility;
 - 223 d. Provide copies of transcripts and recordings on request, at no cost to the requestor
 - 224 or for a fee established by a rule published consistent with the Freedom of
 - 225 Information Act that is no more than the actual cost of duplication; or
 - 226 e. Arrange for court reporters who transcribe or record proceedings under contract
 - 227 with the government to provide copies of such records on request, at no cost to the
 - 228 requestor or for a fee that fairly represents the costs to and services provided by

Commented [A5]: Note to Committee: FACA § 11 requires that agencies “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings.” Although this provision appears in a statute governing advisory committees, its history indicates that it was intended to apply to transcripts in any “agency proceeding” (e.g., rulemaking, adjudication, or licensing per 5 U.S.C. § 551(12)).



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229 ~~the contractor~~ that is no more than the actual cost of duplication.

230 15. Agencies should take steps to redact any information that is protected by law or policy
231 from public disclosure before providing public access to transcripts and recordings.

232 ~~15.~~ 16. Agencies should ensure that transcripts and recordings of open proceedings are
233 available for public inspection in a timely manner.

Commented [A6]: See previous comment.