



## **Administrative Conference Recommendation 2017-1**

### **Adjudication Materials on Agency Websites**

**Adopted June 16, 2017**

In contrast to federal court records, which are available for download from the judiciary’s Public Access to Court Electronic Records (PACER) program (for a fee), or records produced during notice-and-comment rulemaking, which are publicly disseminated on the rulemaking website [www.regulations.gov](http://www.regulations.gov), there exists no single, comprehensive online clearinghouse for the public hosting of decisions and other materials generated throughout the course of federal administrative adjudication.<sup>1</sup> Instead, to the extent a particular adjudication record is digitally available, it is likely to be found on the relevant agency’s website.

This recommendation is confined to records issued or filed in adjudicative proceedings in which a statute, executive order, or regulation mandates an evidentiary hearing.<sup>2</sup> Specifically, this recommendation applies to (a) “[a]djudication that is regulated by the procedural provisions of the Administrative Procedure Act (APA) and usually presided over by an administrative law judge” and (b) “[a]djudication that consists of legally required evidentiary hearings that are not regulated by the APA’s adjudication provisions in 5 U.S.C. §§ 554 and 556–557 and that is presided over by adjudicators who are often called administrative judges.”<sup>3</sup>

Federal administrative adjudication affects an enormous number of individuals and businesses engaged in a range of regulated activities or dependent on any of the several

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<sup>1</sup> The Administrative Conference currently takes no position in this recommendation as to whether there should be such a tool, but will consider whether the issue merits attention in the future. In the meantime, the research underlying this recommendation is limited to an examination of agencies’ existing websites.

<sup>2</sup> See Administrative Conference of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>3</sup> *Id.* (referring to these two types of proceedings as “Type A” and “Type B” adjudication, respectively).



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government benefits programs. The many orders, opinions, pleadings, motions, briefs, petitions, and other records generated by agencies and parties involved in adjudication bespeak the procedural complexities and sophistication of many proceedings.

Many federal laws and directives mandate or encourage the online disclosure of important government materials, including certain adjudication records. The Freedom of Information Act (FOIA) requires that agencies make available in an electronic format “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.”<sup>4</sup> The prevailing interpretation of this provision limits its ambit to “precedential” decisions.<sup>5</sup> Nonetheless, other laws and policies, including most recently the FOIA Improvement Act of 2016,<sup>6</sup> encourage more expansive online disclosure of federal records.<sup>7</sup>

When, as is often the case, adjudicative proceedings involve the application of governmental power to resolve disputes involving private parties, the associated records are of public importance. Further, administrative adjudication records can serve as ready-made models for private parties (especially those who are self-represented)<sup>8</sup> in drafting their own materials and may provide insight into the relevant substantive law and procedural requirements. Easy availability of these materials can save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able

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<sup>4</sup> 5 U.S.C. § 552(a)(2)(A).

<sup>5</sup> See U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT, PROACTIVE DISCLOSURES 10 (2009 ed.); U.S. Dep’t of Justice, Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967).

<sup>6</sup> Pub. L. No. 114-185, 130 Stat. 538 (2016). The Act, for instance, amended the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, by adding a requirement that agencies’ records management programs provide “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” *Id.* § 3102(2).

<sup>7</sup> See, e.g., Office of Mgmt. & Budget Circular A-130, § 5.e.2.a (directing agencies to publish “public information online in a manner that promotes analysis and reuse for the widest possible range of purposes, meaning that the information is publicly accessible, machine-readable, appropriately described, complete, and timely”).

<sup>8</sup> The Conference recently adopted a recommendation that offers best practices for agencies to consider in assisting self-represented parties in administrative hearings. See Administrative Conference of the United States, Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*, 81 Fed. Reg. 94,319 (Dec. 23, 2016).



to respond to remaining FOIA requests. In addition, there may also be more intangible benefits engendered by increased public trust and website user satisfaction.

In the absence of a comprehensive, government-wide platform akin to PACER or [www.regulations.gov](http://www.regulations.gov), agencies generally rely on their individual websites to comply with online transparency laws and initiatives, disclosing the binding orders, opinions, and, in some cases, supporting records produced during adjudicative proceedings. Some agencies host relatively accessible, comprehensive libraries of decisions and supporting adjudication materials. Not all agency websites, however, are equally navigable or robust. Additionally, in providing online access to adjudication materials, agencies utilize navigational and organizational tools and techniques in various ways.

This recommendation offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with a balancing of the transparency objectives and privacy considerations of FOIA and other relevant laws and directives.<sup>9</sup> It is drafted with recognition that all agencies are subject to unique programming and financial constraints, and that the distinctiveness of agencies' respective adjudicative schemes limits the development of workable standardized practices. To the extent agencies are required to expend additional resources in implementing this recommendation, any upfront costs incurred may be accompanied by offsetting benefits.

## RECOMMENDATION

### **Affirmative Disclosure of Adjudication Materials**

1. Agencies should consider providing access on their websites to decisions and supporting materials (e.g., pleadings, motions, briefs) issued and filed in adjudicative proceedings in excess of the affirmative disclosure requirements of the Freedom of Information Act (FOIA).

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<sup>9</sup> For the report undergirding this recommendation, see Daniel J. Sheffner, *Adjudication Materials on Agency Websites* (April 10, 2017) (report to the Admin. Conf. of the U.S.), *available at* <https://www.acus.gov/report/adjudication-materials-agency-websites-final-report-0>.



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In determining which materials to disclose, agencies should ensure that they have implemented appropriate safeguards to protect relevant privacy interests implicated by the disclosure of adjudication materials. Agencies should also consider the following factors in deciding what to disclose:

- a. the interests of the public in gaining insight into the agency's adjudicative processes;
  - b. the costs to the agency in disclosing adjudication materials in excess of FOIA's requirements;
  - c. any offsetting benefits the agency may realize in disclosing these materials; and
  - d. any other relevant considerations, such as agency-specific adjudicative practices.
2. Agencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.

### **Access to Adjudication Materials**

3. Agencies that choose to post all or nearly all decisions and supporting materials filed in adjudicative proceedings should endeavor to group materials from the same proceedings together, for example, by providing a separate docket page for each adjudication.
4. Subject to considerations of cost, agencies should endeavor to ensure that website users are able to locate adjudication materials easily by:
  - a. displaying links to agency adjudication sections in readily accessible locations on the website;
  - b. maintaining a search engine and a site map or index, or both, on or locatable from the homepage;
  - c. offering relevant filtering and advanced search options in conjunction with their main search engines that allow users to specify with greater detail the records or types of records for which they are looking, such as options to sort, narrow, or filter searches by record type, action or case type, date, case number, party, or specific words or phrases; and



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- d. offering general and advanced search and filtering options specifically within the sections of their websites that disclose adjudication materials to sort, narrow, or filter searches in the ways suggested in subparagraph (c).