



## Agency Litigation Webpages

### Committee on Judicial Review

#### Proposed Recommendation | December 17, 2020

1 Federal agencies and their component units<sup>1</sup> participate in thousands of court cases every  
2 year. Most such cases result in “agency litigation materials,” which this recommendation defines  
3 as including agencies’ publicly filed pleadings, briefs, and settlements, as well as court decisions  
4 bearing on agencies’ regulatory or enforcement activities.

5 Public access to agency litigation materials is desirable for at least two reasons. First,  
6 because agency litigation materials often clarify how the federal government interprets and aims  
7 to enforce federal law, they can help people understand their legal obligations. Second, public  
8 access to agency litigation materials promotes accountable and transparent government. Those  
9 two reasons distinguish agency litigation materials from litigation filings by private parties.

10 However valuable public access to agency litigation materials might be, federal law does  
11 little to mandate it. When it comes to agencies’ own litigation filings, only the Freedom of  
12 Information Act (FOIA) requires disclosure, and then only when members of the public specify  
13 the materials in which they are interested.<sup>2</sup> In the same vein, the E-Government Act of 2002  
14 requires federal courts to make their written opinions, including opinions in cases involving  
15 federal agencies, available on websites.<sup>3</sup> But that requirement has not always made judicial

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<sup>1</sup> The term “component units” encompasses an agency’s sub-units, which are often identified under terms like “agency,” “bureau,” “administration,” “division,” or “service.” For example, the United States Fish and Wildlife Service is a component unit of the Department of the Interior, and the Office of Water is a component unit of the United States Environmental Protection Agency.

<sup>2</sup> See 5 U.S.C. § 552(a)(3).

<sup>3</sup> See 44 U.S.C. § 3502(a).



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16 opinions readily accessible to the public, partly because most courts' websites lack functions and  
17 features that would allow users to easily identify cases about specific topics or agencies.

18         The most comprehensive source of agency litigation materials is the federal courts'  
19 Public Access to Court Electronic Records (PACER) service, which provides the public with  
20 instantaneous access to virtually every document filed in every federal court. But PACER  
21 searches often cost money, and the costs can add up quickly, especially when users are uncertain  
22 about what cases or documents they are trying to find. PACER's limited search functionality also  
23 makes it difficult to find cases involving particular agencies, statutes, regulations, or types of  
24 agency action. For example, a person interested in identifying ongoing cases to which the United  
25 States Fish and Wildlife Service (FWS) is a party would have to search for a host of terms—  
26 including "United States Fish and Wildlife Service," "U.S. Fish and Wildlife Service," and the  
27 names of FWS's recent directors—just to come close to identifying all such cases. Even after  
28 conducting all those searches, the person would still have to scroll through and eliminate search  
29 results involving state fish-and-wildlife agencies and private citizens with the same names as  
30 FWS's recent directors. Similarly, were a person interested in finding cases about FWS's listing  
31 of species under the Endangered Species Act (ESA), PACER would not afford that person any  
32 way to filter search results to include only cases about ESA listings. The person's only option  
33 would be to open and review documents in potentially thousands of cases.

34         The cost and time involved in performing this type of research limit PACER's usefulness  
35 as a tool for locating and searching agency litigation materials. And although paid legal services,  
36 such as Westlaw and Lexis, have far greater search capabilities than PACER, their costs can  
37 dissuade many individuals and researchers.

38         Agency litigation webpages, by contrast, can be a convenient way for the public to  
39 examine agency litigation materials. For purposes of this Recommendation, an agency litigation  
40 webpage is a webpage on an agency's website that systematically catalogs and links to agency  
41 litigation materials that may aid the public in understanding the agency's regulatory or



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42 enforcement activities. When agencies maintain up-to-date, search-friendly agency litigation  
43 webpages, the public can visit them and quickly find important filings in court cases concerning  
44 matters of interest. Agency litigation webpages thus make it easier for the public to learn about  
45 the law and to hold government accountable for agencies' actions.

46 Several federal agencies already maintain agency litigation webpages.<sup>4</sup> A survey of  
47 websites for 25 federal agencies of all stripes revealed a range of practices regarding agency  
48 litigation webpages.<sup>5</sup> The survey suggests that most federal agencies do not maintain active  
49 agency litigation webpages. Among those that do, the quality of the agency litigation webpages  
50 varies appreciably. Some contain vast troves of agency litigation materials; others contain much  
51 more limited collections. Some are updated regularly; others are updated only sporadically.  
52 Some are easy to locate and search; others are not. In short, there appears to be no standard  
53 practice for publishing and maintaining agency litigation webpages, save that all the surveyed  
54 agency litigation webpages contained only the publicly filed versions of agency litigation  
55 materials, with all confidential material—such as trade secrets and personal identifying  
56 information—redacted.

57 An inspection of agencies' litigation webpages suggests four general features that make  
58 an agency litigation webpage useful. First, an agency's litigation webpage must be easy to find.  
59 Second, it must contain a representative and up-to-date collection of agency litigation materials.  
60 Third, those materials must be easy to search and sort. And fourth, the agency's litigation  
61 webpage must give visitors the information they need to understand the materials on the

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<sup>4</sup> See Mark Thomson, Report on Agency Litigation Webpages at 14–16 (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/report-agency-litigation-webpages-112420>.

<sup>5</sup> See *id.* at 12–19 (identifying variations in agency practices). The survey conducted for this Recommendation covered all kinds of agencies—big and small, independent and not, regulatory and benefit-oriented, and so forth—with the aim of covering a broad and at least somewhat representative cross-section of federal agencies. In particular, the survey focused on agencies that are frequently in federal court or that are parties to a significant number of high-profile cases.



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62 webpage, including information about materials the agency omitted from the webpage and the  
63 criteria the agency employed to determine which materials to include on the webpage.

64 Agency litigation webpages can promote transparency and accountability. The  
65 Administrative Conference recognizes, however, that creating and maintaining a useful agency  
66 litigation webpage takes time, money, and effort. An agency’s decision to launch an agency  
67 litigation webpage will necessarily be informed by considerations like the agency’s mission,  
68 litigation portfolio, existing technological capacity, budget, and the anticipated benefits—public-  
69 facing and internal—of creating an agency litigation webpage. Further, an agency’s decisions  
70 about what content to include on an agency litigation webpage should be tailored to the agency’s  
71 unique circumstances. An agency that litigates thousands of cases each year, for example, could  
72 choose to feature only a representative sample of agency litigation materials on its agency  
73 litigation webpage.

74 Similarly, an agency that litigates many repetitive, fact-based cases could reasonably  
75 choose to post documents from just a few example cases instead of posting documents from all  
76 of its cases.<sup>6</sup> And an agency that litigates many different types of cases, some of obviously  
77 greater interest to the public than others, might appropriately restrict the contents of its agency  
78 litigation webpage to agency litigation materials from the types of cases that are of greater public  
79 interest, particularly when the agency determines that the resources required to post more agency  
80 litigation materials can be better applied elsewhere.

81 Since the decision to create and maintain an agency litigation webpage involves  
82 balancing factors that will differ from agency to agency, this Recommendation should not be  
83 read to suggest that agency litigation webpages be created and maintained by all agencies,

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<sup>6</sup> Cf. Administrative Conference of the United States, Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017) (“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.”).



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84 especially those that litigate thousands of cases each year. Nor should this Recommendation be  
85 read as dictating the precise contents or structure of agency litigation webpages. While  
86 encouraging the creation and maintenance of agency litigation webpages, the Administrative  
87 Conference recognizes that an agency’s unique circumstances might ultimately militate against  
88 creating an agency litigation webpage or might support only the creation of a comparatively  
89 limited agency litigation webpage. At bottom, this Recommendation simply offers best practices  
90 and factors for agencies to consider in making their agency litigation materials available on their  
91 websites, should the agencies choose to do so. The Recommendation leaves the weighing and  
92 balancing of those factors to the sound discretion of individual agencies.

### RECOMMENDATION

#### **Providing Access to Agency Litigation Materials**

- 93 1. Agencies should consider providing access on their websites to publicly filed pleadings,  
94 briefs, and settlements, as well as court decisions bearing on agencies’ regulatory or  
95 enforcement activities (collectively “agency litigation materials”).
- 96 2. Should an agency choose to post such material, an agency with a large volume of court  
97 litigation could decide not to post documents from every case. The agency might, for  
98 instance, post examples of filings from routine litigation and all or a portion of the filings  
99 from cases raising important or unusual questions.
- 100 3. In determining whether to provide access to agency litigation materials on their websites,  
101 and in determining which types of agency litigation materials to include on their  
102 websites, among the factors agencies should consider are the following:
- 103 a. The internal benefits of maintaining a webpage providing access to certain types  
104 of agency litigation materials;
- 105 b. The public’s interest in having ready access to certain categories of the agency’s  
106 litigation materials;



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- 107           c. The availability and cost of other technological services that may more reliably  
108           and effectively give access to agency litigation material because of its scale or  
109           volume and the wide variety of issues and matters involved;
- 110           d. The extent to which providing access to agency litigation materials on the  
111           agency's website will advance the agency's mission;
- 112           e. The costs of creating and maintaining a webpage providing access to the types of  
113           agency litigation materials the agency sees fit to include;
- 114           f. The nature of the agency's litigation portfolio, including the quantity of litigation  
115           materials the agency generates each year;
- 116           g. The degree to which the agency's existing technological capacity can  
117           accommodate the creation and maintenance of a webpage providing access to  
118           certain types of agency litigation materials; and
- 119           h. The risk of disclosure or wide dissemination of confidential or sensitive  
120           information of private litigants.
- 121           4. In determining which agency litigation materials to include on their websites, agencies  
122           should ensure that they have implemented appropriate safeguards to protect relevant  
123           privacy and business interests implicated by the disclosure of agency litigation materials.  
124           Each agency should implement a protocol to ensure that, before a document is posted to  
125           the agency's litigation webpage, the document has been reviewed and determined not to  
126           contain confidential information, such as trade secrets and personal identifying  
127           information.
- 128           5. Agencies should disclose materials in a way that gives a full and accurate picture of their  
129           litigating positions. To provide proper context, agencies should:
- 130           a. Use objective, clear, and publicly posted criteria to determine which agency  
131           litigation materials the agencies will publish on their websites;



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- 132           b. Regularly review their websites to ensure the agency litigation materials posted  
133           there (especially court opinions) are complete and up-to-date, and consider  
134           including notations regarding when material on the webpage was last updated;
- 135           c. Provide appropriate context for agency litigation materials, at least when failure to  
136           do so might confuse or mislead the public;
- 137           d. Explain the types of litigation in which the agency is involved and other ways to  
138           search for any additional agency litigation materials not included on the agency’s  
139           litigation webpage, as well as opposing counsel’s litigation filings;
- 140           e. When resources permit, consider posting opposing parties’ litigation filings when  
141           they are significant or important to understanding an issue;
- 142           f. Neither present litigation materials as a means of setting policy, nor use those  
143           materials to circumvent rulemaking processes; and
- 144           g. Ensure that descriptions of agency litigation materials, if any, fairly reflect the  
145           litigation.
- 146       6. Agencies that choose to post significant quantities of agency litigation materials on their  
147       websites should consider grouping together links to those materials on a single, dedicated  
148       webpage (an “agency litigation webpage”). If an agency is organized so that its  
149       component units have their own litigation portfolios, some or all of the component units  
150       may wish to have their own agency litigation webpages, or the agency may wish to  
151       maintain an agency litigation webpage compiling litigation materials from or relating to  
152       the agency’s component units.

### **Making It Easy to Locate Agency Litigation Webpages**

- 153       7. Agencies that post agency litigation materials on their websites should make sure that  
154       website users can easily locate those materials. Agencies can accomplish this goal by:
- 155           a. Displaying links to agency litigation webpages in readily visible locations on the  
156           homepage for the agency’s website; and



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- 157           b. Maintaining a search engine and a site map or index, or both, on the agency's  
158           homepage.
- 159       8. When an agency collects its component units' litigation materials on a single agency  
160       litigation webpage, those component units should post links, on their websites, to the  
161       agency's litigation webpage.

### **Making It Easy to Find Relevant Materials on Agency Litigation Webpages**

- 162       9. Agencies and their component units should have substantial flexibility in organizing  
163       materials. Agencies should consider grouping together materials from the same and  
164       related cases on their agency litigation webpages. Agencies might, for example, consider  
165       providing a separate docket page for each case, with a link to the docket page on their  
166       agency litigation webpages. Agencies should also consider linking to the grouped-  
167       together materials when issuing press releases concerning a particular litigation.
- 168       10. Agencies should consider offering general and advanced search and filtering options  
169       within their agency litigation webpages. The search and filtering options could, for  
170       instance, allow users to sort, narrow, or filter searches according to criteria like action or  
171       case type, date, topic, case number, party name, a relevant statute or regulation, or  
172       specific words and phrases, along with any other criteria the agency decides are  
173       especially useful given its litigation activities.