



Agency Publicity in the Internet Era
Committee on Administration and Management
Proposed Recommendation | October 21, 2015

1 In 1973, the Administrative Conference issued Recommendation 73-1, “Adverse Agency
2 Publicity,” recommending that agencies adopt rules containing minimum standards and
3 structured practices governing the issuance of publicity that may adversely affect identified
4 persons.¹ At the time, traditional forms of publicity, such as the press release, were the
5 primary vehicle for agencies to communicate with the public. Subsequent technological
6 developments have led to reductions in the cost and great increases in the speed of agencies’
7 collecting, storing and communicating information, including the predominance of Internet-
8 based communications, expansion of the Internet, the emergence of social media, and the
9 proliferation of searchable online databases capable of storing large amounts of information.
10 These technical advances have created new avenues for agencies to publicly disseminate
11 information about private parties, as well as new challenges for agencies in managing the
12 distribution of information to the public.

13 In this recommendation, the Conference builds upon and supplements the 1973
14 Recommendation and urges agencies to adopt policies and best practices that adequately
15 balance public and private interests in the rapidly changing landscape of modern information
16 disclosure.

Modern Agency Publicity

17 Many agencies are authorized and even required by statute to issue public statements
18 about their activities. Agency use of these statements to inform or warn members of the public
19 of dangers to health, safety, or significant economic harm is essential to protecting society’s

¹ See Administrative Conference of the United States, Recommendation 73-1, *Adverse Agency Publicity*, 38 Fed. Reg. 16,839 (Jun. 27, 1973) [hereinafter Recommendation 73-1].



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

20 interests. Agency publicity can also advance the public interest by enabling consumers to make
21 more informed decisions.

22 But agency publicity also has the potential to cause serious and sometimes unfair injury,
23 particularly when it identifies and singles out specific persons or entities for criticism.
24 Recommendation 73-1 defined “adverse agency publicity” as “statements made by an agency
25 or its personnel which invite public attention to an agency’s action or policy and which may
26 adversely affect persons identified therein.”² As Recommendation 73-1 recognized, adverse
27 agency publicity “is undesirable when it is erroneous, misleading or excessive or it serves no
28 authorized agency purpose.”³

29 Recommendation 73-1 responded to several well-known incidents in which adverse
30 agency publicity issued through press releases caused significant harm to regulated parties.⁴
31 The Administrative Conference called for agencies to adopt published rules requiring publicity
32 to (1) be accurate and not disparaging, (2) announce investigations and other pending actions
33 only in carefully prescribed circumstances, (3) fulfill an authorized purpose, (4) disclose when
34 any information has a limited basis and give parties prior notice when practicable, and (5) be
35 corrected or retracted when erroneous or misleading.⁵ Some agencies implemented
36 Recommendation 73-1 by adopting such rules; other agencies responded to the spirit of the
37 Recommendation by adopting less formal internal policies to address these issues; and still
38 other agencies took no action.

39 In light of subsequent developments, such as the emergence of agency web sites, social
40 media, and searchable online databases as means for agencies to communicate with the public,

² *Id.* Recommendation 73-1 distinguished agency publicity “from the mere decision to make records available to the public rather than preserve their confidentiality,” as those decisions are governed by the criteria set forth in the Freedom of Information Act (FOIA), 5 U.S.C. § 552. To the extent that information is required to be disclosed by FOIA, this recommendation does not suggest withholding such information.

³ Recommendation 73-1.

⁴ *Id.*; see also NATHAN CORTEZ, AGENCY PUBLICITY IN THE INTERNET ERA 1 (September 25, 2015) (Report to the Administrative Conference of the United States) [hereinafter Cortez Report].

⁵ Recommendation 73-1; Cortez Report, at 1.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

41 the Conference commissioned a report to study modern agency publicity practices, identify
42 new challenges, and advise how Recommendation 73-1 might be updated. The report found
43 that the potential for adverse agency publicity to injure private parties has increased
44 substantially with the rapid proliferation of new forms of communication, and that modern
45 publicity has created both new policy and management challenges for agencies.⁶ Most social
46 media, for instance, are designed to generate information that can be accessed quickly and
47 shared widely, increasing the risk that at least some important facts or nuances will be lost
48 when information is disseminated. Social media can also create logistical hurdles for agencies,
49 by making it more difficult for them to exercise control over the distribution and content of
50 communications by individual employees regarding agency actions. A further complication
51 arises from the ability of capital markets, now powered by the Internet, to respond more
52 quickly to agency publicity, increasing the risk for potential damage to a company's reputation
53 and share value, without regard to whether the contents of an initial communication are
54 accurate or interpreted correctly.⁷

55 Another recent development that has the potential to increase the impact of adverse
56 agency publicity on private parties is the proliferation of searchable online databases. Federal
57 agencies now maintain an unknown but large number of searchable online databases that may
58 contain negative information about regulated parties.⁸ The use of such databases may extend
59 back to 1986, when Congress required the Environmental Protection Agency (EPA) to establish
60 a Toxic Release Inventory (TRI) to track chemical releases by facilities nationwide in a computer
61 database accessible to any person.⁹ Interest in using searchable online databases for
62 regulatory purposes has only increased with recent "open government," "smart disclosure,"

⁶ See generally Cortez Report.

⁷ See *id.* at 25.

⁸ See *id.* at 18.

⁹ See *id.* at 18-19. The TRI has been credited with having a significant impact on firm-level emissions and has inspired similar disclosure efforts internationally. See *id.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

63 and “open data” initiatives, which urge agencies to “harness new technologies to put
64 information about their decisions online and readily available to the public.”¹⁰

65 Online databases present special challenges because different agency databases are
66 populated with different kinds of data, which require adoption of different standards to protect
67 the various public and private interests potentially affected by these communications. Some
68 databases include data reported by regulated parties, whereas others include data generated
69 by agencies as part of their regulatory enforcement responsibilities or reported by third parties
70 with varying degrees of quality control. The risk of publishing inaccurate adverse information
71 about regulated parties may be greater when a database includes information produced by
72 agencies or provided by third parties, than when information comes directly from the regulated
73 entity.¹¹ Therefore, policies and best practices governing communications should be based on
74 the nature of the database or databases maintained by the agency, rather than general rules
75 that purportedly apply to all such databases.

76 Although a one-size-fits-all approach is not feasible, given the variety of searchable
77 online databases, an agency’s policies governing databases can be informed by the experience
78 of other agencies, as well as by congressional directives. For example, the Consumer Financial
79 Protection Bureau (CFPB) publishes a consumer complaint database that allows consumers to
80 submit complaints for various financial products.¹² The agency describes its procedures for
81 publishing complaints in Policy Statements published in the Federal Register.¹³ When the CFPB
82 receives a consumer complaint, it authenticates the complaint to confirm a commercial
83 relationship between the consumer and the company, and forwards the complaint to the

¹⁰ See *id.* at 19 (citing Memorandum on Transparency and Open Government, 74 Fed. Reg. 4683, 4685 (Jan. 21, 2009); Executive Office of the President, National Science and Technology Council, Smart Disclosure and Consumer Decisionmaking: Report of the Task Force on Smart Disclosure (May 2013), http://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf).

¹¹ See *id.* at 20.

¹² See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaint/>.

¹³ See, e.g., CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (Jun. 22, 2012).



84 company, which can then respond with pre-set, “structured” responses.¹⁴ For a complaint
85 narrative to be published, the consumer must give consent, and personal information must be
86 removed from the complaint.¹⁵ The agency does not publish complaints that (1) lack critical
87 information (2) have been referred to other agencies, (3) are duplicative, (4) would reveal trade
88 secrets, (5) are fraudulently submitted, or (6) incorrectly identify the regulated entity.¹⁶ The
89 database also contains a disclaimer stating that the agency does not verify all of the facts
90 alleged in complaints.¹⁷ These procedures, described in more detail in the report
91 commissioned by the Conference, can provide a useful body of experience that may be helpful
92 to other agencies that are considering establishment of policies for public communications
93 from similar databases.¹⁸

The Information Quality Act

94 The report commissioned by the Conference also found that the Information Quality Act
95 (IQA), enacted in 2001, could go a long way toward addressing the potential risks of adverse
96 agency disclosures.¹⁹ The IQA requires the Office of Management and Budget (OMB) to issue
97 government-wide guidelines to ensure the quality, objectivity, utility, and integrity of
98 information disseminated by agencies.²⁰ It also requires the OMB to establish administrative

¹⁴ See Cortez Report, note 4 at 62-68.

¹⁵ See *id.*

¹⁶ See *id.* at 64.

¹⁷ See CFPB, Consumer Complaint Database, <http://www.consumerfinance.gov/complaintdatabase/>.

¹⁸ See Cortez Report, note 4 at 62-71. As noted, statutes can also provide guidance to agencies that maintain online databases. For example, the Consumer Product Safety Improvement Act of 2008, 122 Stat. 3016 (codified in various sections of 15 U.S.C.), requires the Consumer Product Safety Commission (CPSC) to establish on its website a searchable database with reports of harm relating to the use of consumer products. The statute requires the CPSC to provide clear and conspicuous notice to database users that the agency does not guarantee the accuracy, completeness, or adequacy of the contents of the database. 15 U.S.C. § 2055(b)(5). It also requires the CPSC to afford procedural protections to regulated parties, such as the opportunity to comment on reports and to request that comments be included in reports, and provides that the agency must consider objections that a report is materially inaccurate. *Id.*

¹⁹ See Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516.

²⁰ See *id.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

99 mechanisms to allow affected persons to request correction of agency-disseminated
100 information that does not meet the IQA's substantive standards.²¹

101 However, it is not clear whether the IQA applies to agency press releases. The IQA
102 purports to apply broadly to "agency dissemination of public information, regardless of the
103 form or format in which such information is disseminated."²² But the OMB's guidelines
104 implementing the IQA issued in 2002 exempt press releases, opinions, and adjudicative
105 processes from the scope of the statute.²³ Many agencies have drafted their own guidelines to
106 implement the IQA, but they have taken different approaches with respect to the press release
107 exemption. Some agencies have narrowed that exemption to provide that the IQA applies to
108 new substantive information in press releases not covered by previous information
109 dissemination subject to the IQA; others have adopted a broad exemption for press releases.²⁴
110 Still others have not addressed the issue at all.²⁵ This variance in outcome has led to confusion
111 regarding the scope of the press release exemption.

112 It is also not clear whether the IQA applies to searchable online databases, since the
113 OMB's guidelines exempt opinions and adjudicative processes. As a result, many databases
114 may be excluded from the scope of data quality protections.²⁶ Clarifying the scope of these
115 exemptions to the IQA would provide a measure of predictability in an area that remains murky
116 and subject to dispute; however, this issue falls outside the scope of the report commissioned
117 by the Conference.

²¹ *See id.*

²² 44 U.S.C. § 3504(d)(1).

²³ 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

²⁴ *See Cortez Report, supra* note 4, Appendix G.

²⁵ *Id.*

²⁶ Excluding agency databases from the purview of the IQA may be necessary when, for example, information is not being presented by the agency as objective and accurate (such as when a database contains information collected from third parties). Even in those circumstances procedures can be adopted to protect regulated parties. *See supra* (discussing procedures adopted by CFPB).



Recommendation

- 118 1. *Written policies.* Agencies that issue adverse publicity should adopt written policies
119 addressing the content and procedures for issuing agency announcements. These
120 policies should include clear internal lines of responsibility for publishing information
121 and safeguards to ensure the accuracy of agency statements. These policies should also
122 address communications regarding the activities of the agency communicated by agency
123 employees acting in their individual capacities.
- 124 2. *Social media.* Agencies that issue adverse publicity should adopt written policies
125 governing social media. Agencies should incorporate into their social media policies
126 best practices and procedures that apply to traditional types of agency publicity, as well
127 as policies to ensure proper use of agency social media accounts.
- 128 3. *Database disclosures.* Agencies should adopt written policies governing online
129 databases that contain adverse information about identified parties. Those policies
130 should include best practices such as:
- 131 a. If the information is presented to the public as accurate and objective, agencies
132 should ensure the accuracy and objectivity of such information.
- 133 b. If the information is not presented to the public as accurate and objective—such
134 as databases of third party complaints—agencies should clearly disclaim the
135 accuracy of the information, including a statement as to whether the
136 information has been verified or authenticated by the agency.
- 137 c. Agencies should ensure that users are informed of the source(s), context, and
138 any limitations on the information contained in the database.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 139 d. Agencies should ensure that subjects identified in the database are given the
140 chance to post responses or request corrections or retractions, subject to
141 reasonable exceptions in the public interest.
- 142 4. *Publication of policies.* Agencies should publish online their written policies governing
143 communication of adverse publicity.
- 144 5. *Employee training.* Agencies should provide training to employees on their adverse
145 publicity policies.
- 146 6. *Advanced notice.* Unless such notice would be impracticable or inconsistent with the
147 nature of the proceeding, agencies should give advanced notice to subjects identified in
148 adverse publicity, but only when the subject is not already aware of an ongoing agency
149 action, such as in cases of fraud or during a public health emergency.
- 150 7. *Publicizing investigations, complaints, and other preliminary actions.* Unless otherwise
151 directed by statute, agencies should not publicize the pendency of investigations
152 directed at a member of the public or regulated entity, except in rare circumstances as
153 required by the public interest, and should publicize complaints and other preliminary
154 actions only with a clear explanation that the action is tentative and non-final.²⁷
- 155 8. *Clarifying the Information Quality Act as to Press Releases.* OMB should clarify that the
156 Information Quality Act applies to new substantive information in press releases that is
157 not covered by previous information disseminated subject to that statute.

²⁷ The Conference supports the principle that when practicable, not otherwise prohibited by statute, and subject to exceptions in the public interest, agencies with the relevant expertise should consider potential capital market reactions to their announcements and try to minimize potential market shocks. See Cortez Report, *supra* note 4, at 89. However, implementation of this principle is complicated by great increases in the speed of communication and trading, and the internationalization of financial markets to permit transactions on a 24 hour per day basis. Consideration of the practical steps necessary for agencies to implement this recommendation in light of these technological advances falls beyond the scope of the report and this project.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

158 9. *Clarifying the Information Quality Act as to Databases.* The OMB should consider
159 updating its guidelines to account for the different types of databases published by
160 agencies.

161 10. *Objections, corrections, and retractions.* Agencies that issue adverse agency publicity not
162 subject to the Information Quality Act should adopt procedures for accepting and
163 responding to objections to such publicity and for correcting and retracting materially
164 inaccurate statements, subject to exceptions in the public interest. Agencies should
165 inform regulated entities to submit their objections to a designated point of contact
166 within the agency.

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