



## Agency Information Dissemination in the Internet Era

### Committee on Administration and Management

#### Draft Recommendation

1 To carry out their missions, many federal agencies are authorized and even required by  
2 statute to issue public statements. Agencies have to maintain a delicate balance when publicly  
3 disseminating information. Information dissemination advances the public interest by  
4 encouraging public participation in government, fostering innovation, and enabling consumers  
5 to make more informed decisions. Active or passive communication of information by agencies  
6 to provide members of the public alerts or data concerning dangers to health, safety, or  
7 significant economic harm is essential to protecting society's interests and must be timely to be  
8 effective. But if not conducted under appropriate processes, agency information dissemination  
9 has the potential to cause unfair injury to persons or entities that are the subject of the  
10 disclosure.<sup>1</sup>

11 In 1973, responding to several incidents in which agency press publicity caused  
12 significant harm to private parties, the Administrative Conference issued Recommendation 73-  
13 1, "Adverse Agency Publicity."<sup>2</sup> Recommendation 73-1 defined "adverse agency publicity" as  
14 "statements made by an agency or its personnel which invite public attention to an agency's  
15 action or policy and which may adversely affect persons identified therein."<sup>3</sup> Recognizing that

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<sup>1</sup> See OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-130, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, MANAGEMENT OF FEDERAL INFORMATION RESOURCES (Nov. 28, 2000). On October 22, 2015, the Office of Management and Budget announced a public comment process to promulgate revisions to Circular No. A-130 to take into account new statutory requirements and enhanced technological capabilities. See Request for Comments on Circular No. A-130, Managing Information as a Strategic Resource, 80 Fed. Reg. 64,022 (Oct. 22, 2015).

<sup>2</sup> 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].

<sup>3</sup> *Id.* In the Recommendation, the Conference distinguished such publicity from "the mere decision to make records available to the public rather than preserve their confidentiality," as the latter is governed by the Freedom of Information Act (FOIA). *Id.* at 16,839 n.1.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

16 adverse agency publicity is undesirable when it is “erroneous, misleading or excessive or it  
17 serves no authorized agency purpose,” the Conference recommended that agencies adopt rules  
18 containing minimum standards and structured practices governing the issuance of publicity.<sup>4</sup>  
19 Some agencies implemented Recommendation 73-1 by adopting such rules; other agencies  
20 responded to the spirit of the Recommendation by adopting less formal internal policies to  
21 address these issues; but most agencies took no action.

22 When Recommendation 73-1 was issued, traditional forms of publicity, such as the press  
23 release, were one of the primary vehicles for agencies to communicate with the public.  
24 Subsequent technological developments have led to reductions in the cost and great increases  
25 in the speed of agencies’ collection, storage, and communication of information. These include  
26 the predominance of Internet-based communications, the emergence of social media,<sup>5</sup> and the  
27 proliferation of searchable online databases capable of storing large amounts of information.<sup>6</sup> In  
28 addition, in recent years, “open government,” “open data,” and “smart disclosure” initiatives  
29 have encouraged or required agencies to disclose information to the public to enhance  
30 government transparency, increase public engagement, and help consumers make smarter  
31 choices in the marketplace.<sup>7</sup>

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<sup>4</sup> *Id.* at 16,839.

<sup>5</sup> This recommendation adopts the definition of “social media” in Recommendation 2013-5, which includes “any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public.” Administrative Conference of the United States, Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>6</sup> For example, capital markets, powered by the Internet, are now able to respond more quickly to information disseminated by agencies, increasing the risk that share value will be significantly affected by such information, without regard to whether the contents of an initial communication are accurate or interpreted correctly.

<sup>7</sup> See, e.g., Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,683, 4,685 (Jan. 21, 2009); OFFICE OF MGMT. & BUDGET, M-13-13, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, OPEN DATA POLICY—MANAGING INFORMATION AS AN ASSET (May 9, 2013); EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE (May 30, 2013).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

32 In light of these developments, the Conference commissioned a report to study modern  
33 agency practices for dissemination of information, identify new challenges, and advise how  
34 Recommendation 73-1 might be updated.<sup>8</sup> The report found that the way in which agencies  
35 communicate with the public has evolved. Many agency communications are still accompanied  
36 by targeted agency press releases and more traditional announcements. But agencies also  
37 release vast amounts of information to the public without specifically calling attention to it.  
38 Some agencies have also established large online databases on their websites through which they  
39 passively publish information about private parties to individuals, groups, and organizations that  
40 seek out such information and data.

41 As a result, this recommendation, in contrast to Recommendation 73-1, addresses  
42 information dissemination by agencies more broadly, rather than focusing on “adverse agency  
43 publicity” that specifically invites public attention to agency action or policy. As used in this  
44 recommendation, the term “information dissemination” covers agency disclosure of information  
45 to the public that may affect persons identified in the disclosure, including such information  
46 when collected by agencies and released to the public through online searchable databases.<sup>9</sup>  
47 Although the scope of this recommendation is broader than Recommendation 73-1, the goal  
48 remains essentially the same: to encourage agencies to adopt policies and practices that  
49 minimize the risk of releasing information to the public that is erroneous, misleading,  
50 unnecessarily pejorative, or serves no authorized agency purpose. This recommendation  
51 therefore builds upon and supplements the 1973 Recommendation.

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<sup>8</sup> See Nathan Cortez, *Agency Publicity in the Internet Era* (September 25, 2015) (report to the Administrative Conference of the United States) [hereinafter Cortez Report], *available at* <https://www.acus.gov/sites/default/files/documents/agency-publicity-in-the-internet-era.pdf>.

<sup>9</sup> ““Information dissemination” does not include distribution limited to government employees or agency contractors or grantees, intra- or inter-agency use or sharing of government information, and responses to requests for agency records under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a. This limitation accords with that in Circular A-130.



52 **Challenges of Modern Agency Information Dissemination**

53 **A. Social Media**

54 The report commissioned by the Conference found that modern forms of information  
55 dissemination have created new policy and management challenges for agencies.<sup>10</sup> Most social  
56 media, for instance, are designed to disseminate information that can be accessed quickly and  
57 shared widely, increasing the risk that at least some important facts or nuances will be lost in the  
58 course of disseminating the information. Social media can also create logistical hurdles for  
59 agencies, by making it more difficult to control the distribution and content of information. The  
60 challenges described herein should be juxtaposed with the fact that information about potential  
61 dangers can reach the public more quickly and could reach broader or more targeted audiences  
62 than ever before.

63 **B. Online Searchable Databases**

64 Online searchable databases present unique challenges for agencies because different  
65 agency databases are populated with different kinds of data, obtained from different sources,  
66 and subject to different quality controls. Such databases may also serve very different purposes.  
67 Some databases include data reported by regulated parties, whereas others include data  
68 generated by agencies as part of their regulatory enforcement responsibilities, and still others  
69 include data reported by third parties. The quality and reliability of the information collected and  
70 made publicly available by the agency, and the definitions of quality and reliability, may thus vary  
71 depending on the nature of the database. This phenomenon requires the adoption of different  
72 standards and processes to protect the various public and private interests potentially affected  
73 by the information set forth in a particular database. In sum, a one-size-fits-all approach is not  
74 feasible, given the variety of searchable online databases.

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<sup>10</sup> See generally Cortez Report, *supra* note 8.



75 Agency policies governing dissemination of information from database disclosures can be  
76 informed or required by congressional directives,<sup>11</sup> by the experience of other agencies, and by  
77 guidance issued in connection with “open government,” “open data,” and “smart disclosure”  
78 initiatives. For instance, the Open Data Policy directive issued by the Office of Management and  
79 Budget (OMB) directs agencies to ensure that “open data”—publicly available data structured in  
80 a way that enables the data to be fully discoverable and usable by end users—is “described fully  
81 so that consumers of the data have sufficient information to understand their strengths,  
82 weaknesses, analytical limitations, security requirements, as well as how to process them.”<sup>12</sup>  
83 This and the other standards in the directive are consistent with the principles of ensuring that  
84 the public has broad access to high quality information and to content about any limitations of  
85 the information.

86 For examples of procedures used to ensure the quality of information disseminated  
87 through online databases, agencies can look to the experience of other agencies. For instance,  
88 some agencies ensure the quality, objectivity, utility, and integrity of data by publishing  
89 procedures for publishing information in databases in the Federal Register; providing pre- or  
90 post- publication procedures to challenge, correct, or comment on data; providing an explanation  
91 of the source, context, and limitations of data; and taking measures to protect privacy and data  
92 security.<sup>13</sup> In other contexts, depending on the nature and purpose of the particular database,

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<sup>11</sup> See Cortez Report, at 20-21, for a discussion of the Consumer Product Safety Improvement Act of 2008, Pub. L. no. 110-314, 122 Stat. 3016 (2008) (codified in various sections of U.S.C. Title 15), which 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, and provides various procedural protections to regulated parties.

<sup>12</sup> OFFICE OF MGMT. & BUDGET, M-13-13, *supra* note 7.

<sup>13</sup> The Consumer Financial Protection Bureau (CFPB), for example, provides protections to both consumers and to companies that are the subject of complaints published in the agency’s consumer complaints database. The CFPB publishes its procedures for publicly disclosing complaints in the Federal Register; authenticates complaints to ensure a business relationship between the complaining consumer and a company; removes personal information from all complaints; gives companies an opportunity to respond to complaints; and does not publish complaints that lack critical information, have been referred to other agencies, are duplicative, would reveal trade secrets, are fraudulent, or incorrectly identify the regulated entity. See Cortez Report, *supra* note 7, at 62-71; see also *id.* at 20



93 more, or less, rigorous procedural protections may be warranted. The report commissioned by  
94 the Conference describes procedures that may be helpful to agencies that are considering  
95 establishing policies for information dissemination from databases.<sup>14</sup>

96 **C. Information Quality Act**

97 More generally, the Information Quality Act (IQA) can also provide a useful framework  
98 for ensuring that information disseminated by agencies is not erroneous, misleading,  
99 inappropriately pejorative, or serves no authorized agency purpose.<sup>15</sup> Enacted in 2001, the IQA  
100 requires OMB to issue government-wide guidelines to ensure the quality, objectivity, utility, and  
101 integrity of information disclosed by agencies. The OMB guidelines implementing the IQA require  
102 agencies to issue their own guidelines to ensure the quality of information they disseminate, as  
103 well as to “establish administrative mechanisms allowing affected persons to seek and obtain,  
104 where appropriate, timely correction of information maintained and disseminated by the agency  
105 that does not comply with OMB or agency guidelines.”<sup>16</sup> Many agencies have created procedures  
106 for requesting correction of agency-disseminated information.

107 The OMB guidelines, however, exempt press releases from the scope of its  
108 requirements.<sup>17</sup> Nevertheless, OMB has appeared to support individual agency guidelines that

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(describing procedures required by the Consumer Product and Safety Improvement Act of 2008 to ensure quality of information disseminated through the CPSC’s SaferProducts.gov database).

<sup>14</sup> See generally *id.*

<sup>15</sup> See Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-153-54 (2000) (codified at 44 U.S.C. §§ 3504(d)(1), 3516).

<sup>16</sup> Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452, 8,459 (Feb. 22, 2002).

<sup>17</sup> *Id.* at 8,460. The guidelines also exempt opinions and adjudicative processes, but those exemptions are beyond the scope of this recommendation.



109 narrow the exemption for press releases.<sup>18</sup> In developing their own guidelines to implement the  
110 IQA, agencies have taken different approaches with respect to the press release exemption.<sup>19</sup>  
111 Some agencies have narrowed that exemption to provide that the IQA applies to new substantive  
112 information in press releases not covered by previous information dissemination subject to the  
113 IQA. Others have adopted a broad exemption for press releases. Still others have not addressed  
114 the issue at all. OMB's clarification of the scope of the press release exemption to the IQA could  
115 provide a measure of predictability in an area that remains murky.

116 In light of these challenges, and given the overarching goal of balancing public and private  
117 interests, the Conference recommends that agencies adopt the following policies and best  
118 practices.

## RECOMMENDATION

119 1. *Written policies.* Agencies that routinely engage in information dissemination that  
120 identifies individuals or private parties should adopt written policies addressing the content and  
121 procedures for information dissemination.

122 a. These policies should include clear internal lines of responsibility for publishing  
123 information and safeguards to ensure quality and integrity.

124 b. These policies should extend to social media and other forms of Internet-based  
125 information dissemination.

126 2. *Database disclosures.* Agencies that create and maintain online databases should  
127 adopt written policies governing dissemination of information through their databases. Those  
128 policies should include the following best practices:

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<sup>18</sup> See JOHN D. GRAHAM, OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, MEMORANDUM FOR PRESIDENT'S MANAGEMENT COUNCIL: AGENCY DRAFT INFORMATION QUALITY GUIDELINES, (June 10, 2002).

<sup>19</sup> See Cortez Report, *supra* note 8, Appendix G.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 129 a. Agencies should ensure that users are informed of the source(s), context, and  
130 procedures taken to ensure data quality, and any limitations on the integrity,  
131 objectivity, or reliability of the database, including whether the information has  
132 been verified or authenticated by the agency.
- 133 b. Agencies should adopt procedures to ensure that subjects identified in the  
134 database are given the opportunity to post responses where practicable or  
135 request corrections or retractions, as appropriate.
- 136 3. *Publication of policies.* Agencies should publish online their information  
137 dissemination policies.
- 138 4. *Employee training.* Agencies should provide the appropriate employees with  
139 training on their information dissemination policies.
- 140 5. *Advance notice.* Where practicable, consistent with the nature of the information  
141 to be disseminated, and reasonable under the circumstances, agencies should give advance  
142 notice to subjects identified in the agencies' dissemination of information.
- 143 6. *Publicizing preliminary investigations.* In those limited instances where an agency  
144 has determined that it is appropriate to disclose a preliminary investigation directed at an  
145 individual or a regulated entity, it should clearly state that no final conclusions have been  
146 reached.
- 147 7. *Publicly disclosing legal complaints and agency adjudicatory proceedings.* If  
148 agencies publicize legal complaints or the commencement of an adjudicatory proceeding, they  
149 should clearly state that the allegations have not been adjudicated and may be disputed.
- 150 8. *Clarifying the Information Quality Act as to Press Releases.* OMB should consider  
151 clarifying whether the Information Quality Act applies to new, substantive information in press  
152 releases that has not previously been disseminated by the agency.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

153           9.     *Objections, corrections, and retractions.* Agencies that routinely engage in  
154 information dissemination not subject to the Information Quality Act should adopt procedures  
155 for accepting and responding to objections to information disseminated by the agency, and for  
156 correcting and retracting materially inaccurate statements, subject to exceptions in the public  
157 interest. Agencies should furnish the public with a designated point of contact within the agency  
158 for submission of objections.

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