Agency Information Dissemination in the Internet Era

Committee on Administration and Management

Draft Recommendation

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

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


³ 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.
adverse agency publicity is undesirable when it is “erroneous, misleading or excessive or it
serves no authorized agency purpose,” the Conference recommended that agencies adopt rules
containing minimum standards and structured practices governing the issuance of publicity.4
Some agencies implemented Recommendation 73-1 by adopting such rules; other agencies
responded to the spirit of the Recommendation by adopting less formal internal policies to
address these issues; but most agencies took no action.

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

4 Id. at 16,839.
5 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
6 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.
7 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
In light of these developments, the Conference commissioned a report to study modern agency practices for dissemination of information, identify new challenges, and advise how Recommendation 73-1 might be updated.\(^8\) The report found that the way in which agencies communicate with the public has evolved. Many agency communications are still accompanied by targeted agency press releases and more traditional announcements. But agencies also release vast amounts of information to the public without specifically calling attention to it. Some agencies have also established large online databases on their websites through which they passively publish information about private parties to individuals, groups, and organizations that seek out such information and data.

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


\(^9\) “‘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.
Challenges of Modern Agency Information Dissemination

A. Social Media

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

B. Online Searchable Databases

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

10 See generally Cortez Report, supra note 8.
Agency policies governing dissemination of information from database disclosures can be informed or required by congressional directives, by the experience of other agencies, and by guidance issued in connection with “open government,” “open data,” and “smart disclosure” initiatives. For instance, the Open Data Policy directive issued by the Office of Management and Budget (OMB) directs agencies to ensure that “open data”—publicly available data structured in a way that enables the data to be fully discoverable and usable by end users—is “described fully so that consumers of the data have sufficient information to understand their strengths, weaknesses, analytical limitations, security requirements, as well as how to process them.”

This and the other standards in the directive are consistent with the principles of ensuring that the public has broad access to high quality information and to content about any limitations of the information.

For examples of procedures used to ensure the quality of information disseminated through online databases, agencies can look to the experience of other agencies. For instance, some agencies ensure the quality, objectivity, utility, and integrity of data by publishing procedures for publishing information in databases in the Federal Register; providing pre- or post-publication procedures to challenge, correct, or comment on data; providing an explanation of the source, context, and limitations of data; and taking measures to protect privacy and data security. In other contexts, depending on the nature and purpose of the particular database,
more, or less, rigorous procedural protections may be warranted. The report commissioned by the Conference describes procedures that may be helpful to agencies that are considering establishing policies for information dissemination from databases.14

C. Information Quality Act

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

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

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14 See generally id.


17 Id. at 8,460. The guidelines also exempt opinions and adjudicative processes, but those exemptions are beyond the scope of this recommendation.
narrow the exemption for press releases. In developing their own guidelines to implement the IQA, agencies have taken different approaches with respect to the press release exemption. Some agencies have narrowed that exemption to provide that the IQA applies to new substantive information in press releases not covered by previous information dissemination subject to the IQA. Others have adopted a broad exemption for press releases. Still others have not addressed the issue at all. OMB’s clarification of the scope of the press release exemption to the IQA could provide a measure of predictability in an area that remains murky.

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

**RECOMMENDATION**

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

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

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

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

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19 See Cortez Report, supra note 8, Appendix G.
a. Agencies should ensure that users are informed of the source(s), context, and procedures taken to ensure data quality, and any limitations on the integrity, objectivity, or reliability of the database, including whether the information has been verified or authenticated by the agency.

b. Agencies should adopt procedures to ensure that subjects identified in the database are given the opportunity to post responses where practicable or request corrections or retractions, as appropriate.

3. Publication of policies. Agencies should publish online their information dissemination policies.

4. Employee training. Agencies should provide the appropriate employees with training on their information dissemination policies.

5. Advance notice. Where practicable, consistent with the nature of the information to be disseminated, and reasonable under the circumstances, agencies should give advance notice to subjects identified in the agencies’ dissemination of information.

6. Publicizing preliminary investigations. In those limited instances where an agency has determined that it is appropriate to disclose a preliminary investigation directed at an individual or a regulated entity, it should clearly state that no final conclusions have been reached.

7. Publicly disclosing legal complaints and agency adjudicatory proceedings. If agencies publicize legal complaints or the commencement of an adjudicatory proceeding, they should clearly state that the allegations have not been adjudicated and may be disputed.

8. Clarifying the Information Quality Act as to Press Releases. OMB should consider clarifying whether the Information Quality Act applies to new, substantive information in press releases that has not previously been disseminated by the agency.
9. **Objections, corrections, and retractions.** Agencies that routinely engage in information dissemination not subject to the Information Quality Act should adopt procedures for accepting and responding to objections to information disseminated by the agency, and for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest. Agencies should furnish the public with a designated point of contact within the agency for submission of objections.