Federal Records in Agency Proceedings

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Abstract

The federal government holds a vast repository of documents, including records about individuals' finances, health, interactions with the criminal justice system, immigration histories, and military service. For current or former government employees, agencies may hold personnel records, ethics information, and financial disclosures. For private businesses, government agencies may have licensing or inspection records, required filings for publicly traded companies, and permitting information. The federal government collects and maintains this information as part of its routine administration of government programs.

For many agency determinations, the records that an agency already possesses are critical to the proceedings. Yet federal government practices vary widely in how agency decision-makers obtain the relevant government records. At one end, the agency bends over backward to gather all the relevant documents itself. At the other extreme, agencies rely on individuals to gather records on their own, including by making Freedom of Information Act requests.

This Article explores the range of agency practices in obtaining government records for use in their proceedings. Drawing on the extant legal requirements for the provision of records to the public in various proceedings and on interviews that the Author conducted with government officials about their agencies' practices, this Article evaluates these practices against the fundamental objectives of fairness, efficiency, and accuracy in agency proceedings. It proposes a framework for considering those values in different contexts, including determinations related to enforcement, benefits, licensing, and contracts or grants, and suggests this framework can help agencies approach the question of how best to obtain relevant information.

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Introduction

Imagine a former servicemember who becomes disabled. It is possible that their disability qualifies them for certain benefits from the Department of Veterans Affairs ("VA").[1] The same underlying documentation may support a claim for benefits from the Social Security Administration ("SSA").[2] The same documents may also demonstrate expenses that are deductible on the servicemember's federal tax return.[3]

Moreover, the servicemember themself may possess the medical records needed to engage in this variety of agency proceedings to determine various benefits and tax obligations, but they may not have easy access to a full history of those records.[4] Instead, the records may be housed at the VA, where the servicemember received medical care, or at the Department of Defense ("DOD") from when the servicemember

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1 *VA Disability Compensation*, U.S. Dep't of Veterans Affs. (May 11, 2026), https://www.va.gov/disability/ [https://perma.cc/8RQZ-4ZXR].

2 *See Disability*, Soc. Sec. Admin., https://www.ssa.gov/disability [https://perma.cc/PY25-B5GD] (last visited May 10, 2026).

3 *See Topic No. 502, Medical and Dental Expenses*, IRS (Jan. 22, 2026), https://www.irs.gov/taxtopics/tc502 [https://perma.cc/BNV6-LG5P].

4 *See, e.g.*, *Upload Evidence to Support Your Disability Claim*, U.S. Dep't of Veterans Affs. (June 9, 2023), https://www.va.gov/disability/upload-supporting-evidence/ [https://perma.cc/P6WE-VSVR].

was on active duty.[5] Other federal records may also be relevant to parts of the inquiry: records documenting the servicemember's honorable discharge, for example, or their current income.[6] Whose obligation is it to locate, access, and collect the needed records for each agency process? What methods are used to accomplish that goal?

The answer to these questions goes to the heart of the fairness, efficiency, and accuracy of agency proceedings. In fact, two phenomena that may initially appear distinct are interrelated: how agencies themselves gather the federal records needed for their own proceedings, and how agencies provide private parties with access to records that the agencies hold that are relevant to those parties' proceedings. Although sometimes implicating separate procedures, these procedural design choices are connected insofar as they often involve a trade-off: The more work an agency does to collect necessary federal records on the back end, the less effort a private party must exert to obtain those records for the purposes of the proceeding.[7] When agencies externalize this burden to the public, it is more difficult for members of the public to obtain those records.[8]

Particular practices regarding federal records in agency proceedings have garnered scholarly attention. For example, studies have highlighted practices involving the use of—or lack of—discovery in agency proceedings.[9] Moreover, scholars have weighed in on particular practices of information sharing between agencies that bear on agency proceedings.[10] In particular, the literature on administrative burden highlights the "connection between elimination of burdens and increasing access to justice" for private, particularly unrepresented, parties before agencies.[11] Yet how agencies should handle the gathering, use, and disclosure of federal records related to agency proceedings has not been systematically theorized on a government-wide basis.

Based in part on original interviews with officials at a wide variety of federal agencies, this Article seeks to fill this gap by providing a framework for procedural design choices concerning the use of records in agency adjudication. In sum, this Article argues that agencies across

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5 *See id.* ("If you don't have copies of these records, you can ask us to request them for you as part of the claim process.").

6 *See id.*

7 Pamela Herd & Donald P. Moynihan, Administrative Burden 2 (2019) (identifying as one policy choice the option "to shift burdens away from the individual, and onto the state, by, for example, requiring eligibility workers to tap into administrative databases to establish whether someone" meets a particular criterion).

8 *See id.*

9 *See, e.g.*, Pamela Herd, Donald Moynihan & Amy Widman, Identifying and Reducing Burdens in Administrative Processes 2, 13 (2023).

10 *Id.* at 36.

11 *Id.* at 2, 14.

the government are deploying seven distinct strategies for managing the need for federal records in adjudication proceedings: (1) agency document gathering, (2) administrative discovery, (3) informal disclosure, (4) portal access, (5) proactive disclosure, (6) Freedom of Information Act ("FOIA") requests, and (7) non-FOIA request processes.[12] Moreover, this Article argues that existing agency practices reveal striking patterns of records use and handling, and that guideposts can help agencies consider how to craft their adjudication procedures to best ensure that federal records are used fairly, accurately, and transparently, thereby promoting the values inherent in adjudicative design.[13]

To be sure, this Article proceeds with some caution. The world of agency adjudication is as vast as it is varied. Necessarily, a one-size-fits-all solution will never emerge, nor can any generalization about how federal records are or should be handled in adjudication stand without exception. Still, a transsubstantive approach to the topic yields a great return on investment. Only by looking across these disparate silos can one see the systemic trade-off between agency burden and private access, a trade-off not yet fully explored in the literature on administrative burden.[14]

Part I below describes the legal framework that applies generally to agencies' collection, use, and disclosure of federal records related to agency proceedings. Part II sets out a framework for procedural design as to the use of federal records in agency proceedings. Drawing from original interviews that the Author conducted with government officials at more than a dozen federal agencies, as well as primary agency materials and secondary literature, this Part ambitiously analyzes the

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12 *Infra* Part II.

13 *Infra* Part III.

14 Although some of the literature touches on aspects of this dynamic, none of it focuses on this question across agencies. For example, the poverty law literature on "bureaucratic disentitlement" has long identified various ways in which potentially eligible beneficiaries of government programs can be de facto excluded through procedural hurdles, including documentation demands. *See, e.g.*, Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 Soc. Serv. Rev. 3, 8 (1984); Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 Geo. J. on Poverty L. & Pol'y 13, 18–19 (2005). Some work has focused on administrative burden, including documentation, at particular agencies. *See, e.g.*, Leslie Book, T. Keith Fogg & Nina E. Olson, *Reducing Administrative Burdens to Protect Taxpayer Rights*, 74 Okla. L. Rev. 527, 529 (2022). And in pathbreaking work, Professors Pamela Herd and Donald Moynihan defined administrative burden in the legal academic context as consisting of learning, compliance, and psychological costs that members of the public experience when interacting with government bureaucracy. *See* Herd & Moynihan, *supra* note 7, at 2. The compliance category in this framework would include documentation burdens, and scholars have previously identified this trade-off. *See id.*; *see also* Pamela Herd, Donald Moynihan & Amy Widman, *Tackling Administrative Burdens: The Legal Framework and Innovative Practices*, 76 Admin. L. Rev. 243, 247 (2024) (identifying particular strategies to reduce administrative burden and identifying documentation requirements as a portion of compliance costs). This Article builds on this prior work.

due process–type considerations of fairness, accuracy, and legitimacy of agency adjudication as to each procedural design option in conjunction with administrative burden concerns from the perspective of both the agency and the private party involved.

Part III makes normative claims regarding agency practice, urging agencies to consider the use of federal records in adjudication design specifically to guard against some of the most negative aspects of current practice. It also encourages agencies to embrace best practices that federal agencies have espoused in salient examples. This Article concludes by warning of the need to proactively consider federal records use—particularly in a rapidly evolving information ecosystem—to ensure that members of the public are treated fairly in their dealings with government agencies.

I. Legal Architecture for Federal Records in Adjudication

The government holds a vast repository of documents about countless individuals, often including records related to finances, health, interactions with the criminal justice system, immigration histories, and military service.[15] These records are often needed in and related to particular proceedings, whether involving enforcement, benefits, licensing, or determinations about claims against a third party.[16] These proceedings all fall within the broader category of agency adjudication, as they result in determinations that resolve disputes or claims about particular private parties.[17]

Indeed, the term "adjudication" in the agency context has an almost unimaginably broad meaning. In a pathbreaking report, Professor Michael Asimow first typologized agency adjudication into three categories.[18] Type A adjudications are those conducted pursuant to the formal hearing procedures in the Administrative Procedure Act

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15 *See* Margaret B. Kwoka, *First-Person FOIA*, 127 Yale L.J. 2204, 2220–55 (2018) (documenting this type of information at a variety of agencies).

16 *See id.* at 2204; 5 U.S.C. § 551(4)–(7).

17 The Administrative Procedure Act defines adjudication extremely broadly. *See* 5 U.S.C. § 551(4)–(7) (defining adjudication as a process that results in an "order," which is a final disposition in any matter other than rulemaking which normally produces statements of general applicability). In a sourcebook published by ACUS that defines the typologies of administrative adjudication, Professor Michael Asimow defines adjudication in the way it is more commonly used to encompass "a decision by government officials made through an administrative process to resolve a claim or dispute between a private party and the government or between two private parties arising out of a government program." Michael Asimow, Admin. Conf. of the U.S., Federal Administrative Adjudication Outside the Administrative Procedure Act 8 (2019).

18 Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 2–3 (2016).

("APA"),[19] including formalities such as a trial-type hearing before an administrative law judge on a closed record.[20] Type B adjudications are those in which an evidentiary hearing is required by a source other than the APA, such as another statute, an agency regulation, or an executive order.[21] Although these are sometimes called "informal" adjudications because formal APA procedures are not required, these hearings are often as formal as APA adjudications and thus more appropriately described as Type B adjudications.[22] Finally, Type C adjudication occurs when there is no legally required evidentiary hearing at all; rather, the agency uses informal procedures to produce what are nonetheless legally binding decisions that affect the public.[23]

This Article cuts across all three types of adjudication but does not employ this typology. The procedures this Article is concerned with are hardly addressed by the generalized legal frameworks that distinguish these types of adjudications. As described in more detail below, the Constitution's Due Process Clause, the APA, and even other statutes that require evidentiary hearings are largely silent on the collection procedures for government documents and their provision to the private party in agency proceedings.[24] As a result, agency practice concerning the collection and provision of government records is governed by other laws and guidance not specific to adjudication, as well as the agency's own programmatic choices.[25]

Although the scope of this Article across adjudication is quite broad, in another way, its scope is relatively narrow: It is limited to the practices for obtaining and using only federal agency records, not all information available from any source. "Records" are limited to recorded information that was made, received, or maintained by a federal agency.[26] As a result, this Article does not directly address agency practices for obtaining information from private parties. Once the agency obtains such information, however, a private party or other agency who subsequently seeks that information from the agency would be obtaining a federal government record.[27] This design choice reflects

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19 5 U.S.C. §§ 551–559, 701–706.

20 *Id.* at 3–4; *see also* 5 U.S.C. § 554 (detailing APA adjudication procedures); 5 U.S.C. § 556(e) (requiring that formal adjudication create an "exclusive record").

21 Asimow, *supra* note 17, at 4, 6.

22 *Id.* at 5–6 (noting that Type B adjudications are not governed by the formal procedures but still require evidentiary hearings presided over by a type of judge).

23 *Id.* at 4.

24 *Infra* Section I.A.

25 *Id.*

26 *See* 5 U.S.C. § 552a(a)(4) (defining "records" for the purposes of the Privacy Act); 44 U.S.C. § 3301(a)(1)(A) (defining "records" for the purposes of the Federal Records Act); 5 U.S.C. § 552(f)(2) (defining "records" for the purposes of FOIA).

27 *See supra* text accompanying note 26.

this Article's goal: to identify the various considerations for procedural design related to obtaining *government* documents needed for agency proceedings, and set forth best practices for promoting fairness, accuracy, and timeliness. Below is an outline of the transsubstantive laws that affect records practices related to agency adjudication.

A. Disclosure to Private Parties

The Constitution confers no general right to prehearing discovery[28]—that is, the ability to compel an agency to search its files for relevant evidence[29]—and the First Amendment does not contain any general right of public access to government documents.[30] To be sure, the Due Process Clauses of the Fifth and Fourteenth Amendments have been used to prevent government actions based on secret evidence, but such a guarantee—when it applies—only ensures that the private party can see the evidence that the agency is actually relying upon; it does not provide a right for the private party to access the potentially vast repository of relevant records that the agency did not use and which the government might have in its possession.[31]

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28 Kelly v. EPA, 203 F.3d 519, 523 (7th Cir. 2000); Alexander v. Pathfinder, Inc., 189 F.3d 735, 741 (8th Cir. 1999); NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 857–58 (2d Cir. 1970); Chafian v. Ala. Bd. of Chiropractic Exam'rs, 647 So. 2d 759, 762 (Ala. Civ. App. 1994); Pet v. Dep't of Health Servs., 542 A.2d 672, 677 (Conn. 1988); *In re* Herndon, 596 A.2d 592, 595 (D.C. Cir. 1991); *In re* Tobin, 628 N.E.2d 1268, 1271 (Mass. 1994); State *ex rel.* Hoover v. Smith, 482 S.E.2d 124, 129 (W. Va. 1997). In criminal proceedings, the accused has a constitutional right to access evidence that is both favorable and material. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

29 The primary exception to this is a limited right of public access to certain court proceedings and related court documents. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573, 577 (1980) (finding a presumptive First Amendment right of access to judicial proceedings in criminal cases). Circuit courts that have considered access in civil cases have uniformly found such a right. *See, e.g.*, N.Y. C.L. Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012); Rushford v. New Yorker Mag., Inc., 846 F.2d 249, 253 (4th Cir. 1988); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983); Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983). As to judicial records, courts evaluate access rights on a case-by-case basis, considering the history and use of the records. Press-Enterprise Co. v. Superior Ct., 478 U.S. 1, 13–15 (1986).

30 *See* Mark Fenster, *FOIA as an Administrative Law*, *in* Troubling Transparency 52, 52–53 (David E. Pozen & Michael Schudson eds., 2018) (evaluating the alternative of constitutionalizing rights of access).

31 The Supreme Court has occasionally found a right of access in particular circumstances, but those circumstances have been narrow and would not apply to the vast majority of agency proceedings. *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 508 (1959) (holding that as a matter of due process, "in the absence of explicit authorization from either the President or Congress[,] the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination").

Likewise, the APA contains no discovery rights.[32] It does require that some agency decisions be based on an exclusive record,[33] and it requires an agency to defend its decisions based on a record that can be produced in court.[34] But again, such a right does not provide a mechanism for a private party to access agency files on which the agency did not rely.[35] Nonetheless, the Administrative Conference of the United States ("ACUS") has long recommended that agencies adopt prehearing discovery to "insure[] [sic] that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing."[36] The policy goals undergirding this recommendation are—unsurprisingly—accuracy, efficiency, and fairness.[37]

And indeed, many agency proceedings do afford some discovery rights under procedures established either by the governing statute, agency regulations, or both.[38] Some agencies provide discovery that is nearly indistinguishable from that afforded by the Federal Rules of Civil Procedure in federal court.[39] For example, in proceedings before administrative law judges ("ALJs") at the Securities and Exchange Commission, extensive documents are subject to disclosure requirements to the private party, including—subject to exceptions—"documents obtained by the [agency] prior to the institution of proceedings, in

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32 *Kelly*, 203 F.3d at 523 ("The Administrative Procedure Act contains no provision for pretrial discovery in the administrative process . . . ."); Moore v. Adm'r, Veterans Admin., 475 F.2d 1283, 1286 (D.C. Cir. 1973) ("In general, it is well established that no right to a preliminary investigatory file exists in administrative law . . . ."). The APA does provide the option of issuing subpoenas, but that provision only applies in limited circumstances. 5 U.S.C. § 555(d) ("Agency subpenas [sic] authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.").

33 In particular, the APA procedures for formal adjudication require an exclusive record. *See* 5 U.S.C. § 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties."); *see also* 5 U.S.C. § 557(d) (banning ex parte communications in formal proceedings).

34 5 U.S.C. § 706 ("[T]he court shall review the whole record . . . ."); *see also* Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 3 (2018) (documenting confusion in the courts concerning the meaning of the record requirement).

35 *See* Discovery in Agency Adjudication, 38 Fed. Reg. 19,786, 19,786 (July 23, 1973).

36 *Id.*

37 *See id.*; More recently, ACUS recommended that agencies provide discovery rights in Type B adjudications and "permit parties to inspect unprivileged materials in agency files that are not otherwise protected." Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016). Moreover, ACUS's model adjudication rules provide for discovery in agency adjudications. ADMIN. CONF. OF THE U.S., MODEL ADJUDICATION RULES 38–51 (2018) (Rules 230–239).

38 *See, e.g.*, 29 C.F.R. § 2200.52(a)(1)(v) (2025).

39 *See* 17 C.F.R. § 201.230(a)(1) (2019).

connection with the investigation leading to the [agency's] recommendation to institute proceedings."[40]

Yet robust discovery opportunities are extended only in some kinds of agency proceedings and are notably absent in others, including some that are conducted with a live hearing and adjudicated by an administrative judge. For example, in immigration court, where a noncitizen's right to remain in the United States is on the line, there is no right for the noncitizen to seek discovery from the agency's file of information about the case.[41] Furthermore, in many adjudications conducted without an evidentiary hearing—particularly frontline adjudications or initial decisions by agency officials—disclosure or discovery obligations are nonexistent. For example, in applying for a Trusted Traveler Program, like Global Entry, there is no exchange of information except the resulting decision sent by mail.[42]

When the government does not need to turn over records to the private party in a proceeding, FOIA serves as a stand-in.[43] In fact, some agencies expressly rely on FOIA for that purpose and advise members of the public to use FOIA to those ends.[44] FOIA gives any person the right to request federal agency records for any reason at all, and it requires the government to disclose records upon request unless they fall within one of nine enumerated exemptions.[45] As such, it offers a process that can be used by a member of the public involved in an agency proceeding to "discover" the records that the agency holds that relate to that proceeding.

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40 *Id.*

41 Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brook. L. Rev. 1569, 1573 (2014).

42 *See* U.S. Gov't Accountability Off., GAO-24-106314, Trusted Traveler Programs: DHS Has Enrollment Processes, but CBP Should Provide Additional Information on Reconsiderations 26–27 (2024), https://www.gao.gov/assets/gao-24-106314.pdf [https://perma.cc/CM9H-BXCH] ("[The Customs and Border Protection denial letters] may not provide specific information about the reason for denial or revocation . . . ."); *infra* text accompanying notes 269–70. Although the Author uncovered no example in which discovery per se was available during a proceeding for an initial decision not accompanied by an evidentiary hearing, disclosure procedures did occasionally exist. For example, the Equal Employment Opportunity Commission ("EEOC") provides a method for requesting the opposing party's position statement during the investigation. *See infra* text accompanying notes 295–300.

43 Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 Md. L. Rev. 119, 184 (1984) ("[P]erceived inadequacies in administrative discovery increase the parallel use of the FOIA."); Freedom of Info. Act Fed. Advisory Comm., Nat'l Archives, Report to the Archivist of the United States 26 (2020), https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf [https://perma.cc/D7CU-6PLE].

44 *See* discussion *infra* Section II.F (discussing the EEOC and the Pension Benefit Guarantee Corporation ("PBGC") as examples).

45 5 U.S.C. § 552(a)(3)(A), (b)(1)–(9).

FOIA requests made by individuals seeking records about themselves are typically referred to as "first-party" or "first-person" requests.[46] These requests are often also processed under the Privacy Act of 1974,[47] a statute that also specifically provides a right of access for individuals' own records.[48] The Privacy Act, however, only applies to records found within a statutorily defined "system of records."[49] Moreover, the Privacy Act applies only to natural persons or individuals—not corporations, partnerships, or other legal entities—and only to citizens, lawful permanent residents, and citizens of certain designated other countries.[50] As such, the Privacy Act's disclosure requirements are substantially narrower than FOIA's, which are available to any legal person and apply to any records held by federal agencies.[51]

Procedurally, FOIA provides that an agency, "upon any request for records . . . , shall make the records promptly available to any person."[52] The request must reasonably describe the documents sought but does not need a statement of purpose or justification.[53] For its part, the agency must respond within twenty business days and must provide the requested records unless they fall within an enumerated exemption, which covers interests such as national security, law enforcement investigations, trade secrecy and confidential business information, and personal privacy.[54] FOIA also incorporates prohibitions on disclosure contained in other statutes under Exemption 3.[55] When a person makes a FOIA request about their own records, agencies typically require the

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46 Off. of Gov't Info. Servs., Nat'l Archives, OGIS Issue Assessment: Commonly Requested Categories of First-Party Records (2021), https://www.archives.gov/ogis/foia-compliance-program/targeted-assessments/first-party-records-30-aug-2021#_ftnref4 [https://perma.cc/9HGA-9AX3]; Kwoka, *supra* note 15, at 2208.

47 5 U.S.C. § 552a.

48 DOJ, Overview of the Privacy Act of 1974, at 1 (2020), https://www.justice.gov/Overview_2020/dl?inline [https://perma.cc/87EY-Z3JX] (describing how, beyond merely providing access to one's own records, the Privacy Act also restricts the disclosure of private information, gives individuals an opportunity to amend their own agency records that are inaccurate, and requires agencies to comply with certain information practices concerning the collection and maintenance of information about individuals).

49 5 U.S.C. § 552a(d).

50 DOJ, *supra* note 48, at 22 (definition of "[i]ndividual" and accompanying comment).

51 5 U.S.C. § 552(a)(3)(A).

52 *Id.*

53 *Id.*

54 *Id.* § 552(a)(6)(A), (b)(1)–(9).

55 *Id.* § 552(b)(3) (exempting records that are "specifically exempted from disclosure by statute . . . , if that statute (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009," Pub. L. No. 111-83, 123 Stat. 2142, 2184, "specifically cites to this paragraph").

requester to file a certification of their own identity to waive their privacy rights and allow release of personal information to themselves.[56]

FOIA requesters also benefit from robust and well-established procedural protections. If an agency denies a request, a requester can file an administrative appeal that goes to a different agency official for consideration.[57] If that appeal is denied, a requester may sue in federal court, and prevailing plaintiffs can recover attorney fees from the government.[58] The court is mandated to conduct a de novo review, with no deference to the agency's position.[59] Additionally, if the agency misses the statutory deadline for a response at either the request or appeal stage, it is deemed a constructive denial with a right to go immediately to federal court.[60]

Private parties use FOIA to obtain federal records that they need to best advance their position in agency proceedings concerning themselves; it often creates a dynamic that is discussed elsewhere as "request-and-return."[61] That is to say, sometimes requesters seek records that they turn around and file with the responding agency itself as part of their application for benefits or in defense of enforcement proceedings.[62] Request-and-return may occur at a single agency or between agencies, such as when a FOIA request for records from one agency is used to obtain documents that are then submitted to another agency as part of its proceedings.[63] As such, FOIA is a method not only by which individuals might access records for use in agency proceedings, but it may even serve as the method by which the agencies gather the necessary records for use in their own proceedings.

B. Information Sharing Between Agencies

Agencies, in their own proceedings, of course, often rely on their own internal information gathered through their regulatory, monitoring, enforcement, and routine administration of their programs. But agencies may also need to rely on information held by other federal agencies. They can gather such information by requiring the private party to go through the request-and-return process described above, as

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56 *See, e.g.*, DOJ, Certification of Identity Form DOJ-361, https://www.fbi.gov/file-repository/u-s-department-of-justice-form-361-certification-of-identity.pdf/view [https://perma.cc/P339-HDQP] (last visited May 30, 2026).

57 5 U.S.C. § 552(a)(6)(A)(III).

58 *Id.* § 552(a)(4)(E).

59 *Id.* § 552(a)(4)(A)(vii).

60 *Id.* § 552(a)(6)(C)(i).

61 Kwoka, *supra* note 15, at 2261–62.

62 *Id.* at 2261.

63 *See id.*

well as by engaging with other agencies directly through case information sharing or database cross-referencing.

The primary legal framework for such information sharing arises from the Computer Matching and Privacy Protection Act of 1988 ("Matching Act"),[64] which amended the Privacy Act of 1974 to establish procedural safeguards for how federal agencies could use computer record matching between agencies or between federal agencies and state agencies to share information related to an individual.[65]

Specifically, the Matching Act governs automated data sharing between federal agencies or between a federal agency and a state agency about individual data for the purpose of verifying eligibility for benefits, or recouping overpayments or delinquent debts under federal programs.[66] This data sharing could be either matching all records in one system with all records in a second or comparing a single record with the contents of a separate records system.[67] As the Office of Management and Budget ("OMB") has explained, "Inter-agency sharing of information about individuals can be an important tool in improving the efficiency of government programs. By sharing data, agencies can often reduce errors, improve program efficiency, identify and prevent fraud, find intended beneficiaries, evaluate program performance, and reduce information collection burden on the public."[68]

Despite these clear potential benefits of matching programs, Congress, through the Matching Act, attempted to mitigate the possible privacy and due-process-like concerns that might arise.[69] To that end, the law requires agencies who wish to share access to records maintained in databases about individuals to enter into a written agreement that describes the scope of information sharing and provides procedures for notifying individuals whose information will be subject to computer matching, among other requirements.[70] The Matching Act further requires agencies to check the validity of information obtained through matching and provide an opportunity for individuals whose records are used in a matching program to contest any findings made based on that

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64 *See* Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, 102 Stat. 2507 (codified as amended at 5 U.S.C. § 552a).

65 *Id.*

66 5 U.S.C. § 552a(a)(8).

67 Natalie R. Ortiz, Cong. Rsch. Serv., R47325, Computer Matching and Privacy Protection Act: Data Integration and Individual Rights 7 (2022), https://www.congress.gov/crs_external_products/R/PDF/R47325/R47325.3.pdf [https://perma.cc/88ZW-EZPD].

68 OMB, Memoranda 01-05—Guidance on Inter-Agency Sharing of Personal Data—Protecting Personal Privacy (2000), https://www.whitehouse.gov/wp-content/uploads/2017/11/2001-M-01-05-Guidance-on-Inter-Agency-Sharing-of-Personal-Data-Protecting-Personal-Privacy.pdf [https://perma.cc/Z9L3-F7Y7].

69 *See id.* ("To ensure accuracy, agencies must also adhere to the due process requirements found in the Matching Act.").

70 5 U.S.C. § 552a(o).

information.[71] Agencies must also establish a Data Integrity Board to approve matching agreements and oversee matching programs,[72] and matching agreements must be made available to the public.[73] Agencies must also report annually on matching programs.[74]

A wide variety of agencies have matching programs, including the Department of Health and Human Services, Department of Homeland Security ("DHS"), Federal Communications Commission ("FCC"), Small Business Administration, SSA, and Department of the Treasury.[75] For example, the DOD shares information with the Department of Education ("ED") regarding children whose parent was in the military and died in conjunction with service in Iraq or Afghanistan after September 11th to facilitate proving eligibility for increased financial aid for higher education.[76]

Still, Matching Act agreements and their procedural protections do not govern all the information sharing between agencies. First, the Matching Act only regulates digital record sharing "for the purpose of establishing or verifying the eligibility" for benefits programs, "recouping payments or delinquent debts" under such a benefit program, or matching federal personnel or payroll records.[77] Thus, any computer matching for the purposes of law enforcement or regulatory enforcement would be excluded.[78] Indeed, the Act contains various categorical exceptions, such as matches performed for statistical, research, tax, and foreign intelligence purposes.[79] Second, a Congressional Research Service report noted "a lack of consistency across agencies in their interpretation of what constitutes a matching program, which ultimately affects compliance."[80] In particular, some agencies applied the Matching Act procedures only to programs that matched entire systems of records against one another, not to a single record matching to a second system of records.[81] Third, a federal government initiative known as Do Not Pay created a centralized portal for agencies to screen payees

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71 *Id.* § 552a(p).

72 *Id.* § 552a(u).

73 *Id.* § 552a(o)(2)(A)(ii).

74 *Id.* § 552a(u)(3)(D) (requiring each agency's Data Integrity Board to compile an annual report describing the matching activities of the agency).

75 Ortiz, *supra* note 67, at 1.

76 *Id.* at 42–46 tbl. B-1.

77 5 U.S.C. § 552a(a)(8)(A)(i).

78 *See id.* § 552a(a)(8)(B)(iii); *see also* Privacy Act of 1974, Final Guidance on Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988, 54 Fed. Reg. 25,818, 25,823 (1989) (describing various types of matching programs that do not have the requisite primary purposes to invoke Matching Act protections).

79 5 U.S.C. § 552a(a)(8)(B)(i)–(vi).

80 Ortiz, *supra* note 67, at 12 (footnote omitted).

81 *Id.* at 13.

to verify various types of eligibility, and Congress passed an exception to the Matching Act for Do Not Pay in 2019.[82]

As a result, and as described in the examples explored below, agencies regularly and informally share information in ways not subject to Matching Act requirements.[83] Sometimes those practices are governed by their own memoranda of understanding, but often they are relationship based.[84]

C. Reducing Administrative Burden

"Administrative burden" is a term typically used to describe the difficulties people encounter when interacting with government entities. Professors Pamela Herd and Donald Moynihan first set out a tripartite categorization of types of administrative burden, categories they label as (1) "learning costs," or the time spent learning how to navigate a process; (2) "compliance costs," or the time and money spent on following rules and requirements; and (3) "psychological costs," or stigma or stress when dealing with a process.[85] Moreover, their research established how burdens are not equally distributed; those with fewer resources face more administrative burden, all while being less equipped to navigate them.[86] The same is true for some members of the public who have a disability, as well as individuals for whom English is not their first language.[87]

As to records, there are often trade-offs between placing more burdens on members of the public and the government absorbing those burdens itself.[88] For example, when a member of the public applies for benefits, one option is to require that they gather all the documents necessary to determine entitlement to benefits.[89] If a benefit is based on financial means, an applicant may need to submit tax returns.[90] If a benefit is based on disability, an applicant may need to submit medical

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82 Payment Integrity Information Act of 2019, Pub. L. No. 116-117, § 3354, 134 Stat. 113, 126 (2020); *see About Do Not Pay*, Bureau of the Fiscal Serv., Dep't. of Treasury (Mar. 25, 2026), https://fiscal.treasury.gov/dnp/about.html [https://perma.cc/33G2-49BE].

83 *Infra* Section I.C.

84 *Infra* Section I.C.

85 Herd & Moynihan, *supra* note 7, at 2.

86 *Id.* at 8.

87 *See id.* at 117, 134, 158.

88 *See id.* at 2.

89 *See, e.g.*, *Upload Evidence to Support Your Disability Claim*, *supra* note 4.

90 *E.g.*, Jonathan P. Schneller, Adam S. Chilton & Joshua L. Boehm, *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 Colum. J. Tax L. 176, 178 (2012) (noting that the earned income tax credit requires "self-certification via the filing of a tax return").

records.[91] And if a benefit is based on citizenship, an applicant may need to submit naturalization papers.[92] In any of these examples, the agency could either require the applicant to gather these records—including from other federal agencies that might hold them—or it could obtain those records directly from other agencies once the applicant submits some initial basic identity information.[93] But reducing the burden on the individual would require increasing the burden on the agency.

Moreover, externalizing bureaucratic costs by shifting those costs onto members of the public often creates a void into which third-party actors may step. Sometimes these third parties are nonprofit or advocacy organizations who seek to help individuals navigate the process as a public service.[94] Other times, the third parties are for-profit private services, including the services of attorneys or companies that profit from the need for assistance these burdensome requirements create.[95] This externality is likely unintended but can create a dynamic in which a business lobby opposes changes that would lessen administrative burden.[96]

Recognizing this troubling dynamic, there has been a push to make government simpler and more accessible, including by presidential directives instructing agencies to reduce administrative burden by, among other things, "identifying specific steps to reduce information collection burdens on customers to enhance access across agencies."[97]

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91 *See, e.g.*, Frank S. Bloch, *Medical Proof, Social Policy, and Social Security's Medically Centered Definition of Disability*, 92 Cornell L. Rev. 189, 222–23 (2007) (describing how Disability Determination Services will review medical records when deciding claims).

92 Joanna Bauer, Lisa Angus, Nurit Fischler, Kenneth D. Rosenberg, Teresa F. Gipson & Jennifer DeVoe, *The Impact of Citizenship Documentation Requirements on Access to Medicaid for Pregnant Women in Oregon*, 15 Maternal & Child Health J. 753, 753 (2011) (noting that documentation of citizenship is required when applying for Medicaid).

93 *See, e.g.*, *Upload Evidence to Support Your Disability Claim*, *supra* note 4 ("If you don't have copies of these records, you can ask us to request them for you as part of the claim process.").

94 *See, e.g.*, Herd & Moynihan, *supra* note 7, at 143, 182 (documenting how nonprofits lessened learning burdens created by changes to the Supplemental Nutrition Assistance Program by engaging in public education and how nonprofits worked with community organizations to assist with Medicaid enrollment).

95 Many people, for example, hire tax attorneys or use professional, for-profit tax services such as TurboTax to assist in filing tax returns. David I. Walker, *Tax Complexity and Technology*, 97 Ind. L.J. 1095, 1097 (2022). In another example, the complexity of filing FOIA requests for routinely needed records in the business community has led to a cottage industry of what this Author has labeled elsewhere as "information resellers." Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1424–26 (2016).

96 *See* Tara Siegel Bernard, *I.R.S. Halts Free Online Offering for Filing Taxes Directly*, N.Y. Times (Nov. 6, 2025), https://www.nytimes.com/2025/11/06/business/taxes-irs-direct-file.html [https://perma.cc/8TDQ-JWB5].

97 Exec. Order No. 14,058, 86 Fed. Reg. 71,357, 71,363 (Dec. 16, 2021); *see also* Herd, Moynihan & Widman, *supra* note 9, at 16 (discussing the limitations of providing information alone to increase accessibility to administrative benefits).

The White House Legal Aid Interagency Roundtable has recommended simplifying agency processes so as to reduce the need for legal representation.[98] ACUS has recommended reducing administrative burden by limiting documentation requirements and providing expeditious access to records pertaining to agency proceedings.[99]

Although these efforts have highlighted the problems of administrative burden, legal requirements to reduce the burden of interacting with agencies are not new. The primary legislative requirements in this area stem from the Paperwork Reduction Act ("PRA"),[100] enacted in 1980 and arising from the need for the public to interact with federal agencies by providing reports, filling out forms, and otherwise furnishing information to the government.[101] The PRA created the Office of Information and Regulatory Affairs ("OIRA"), a component of the OMB, to oversee information policy and administer the provisions of the PRA.[102] The basic provisions of the PRA require all "information collections," or standardized requests for information from members of the public, to be cleared by OIRA to ensure that it "is the least burdensome necessary, is not duplicative, and has practical utility."[103]

II. A Framework for Information Collection and Access Approaches

Agencies have taken a wide variety of approaches to both gathering necessary records for agency proceedings and providing access to those records to the affected private party. This Part seeks to typologize a framework for information collection and access. To this end, it deploys a wide variety of case studies from across federal agencies and categorizes types of agency practice concerning federal record use in adjudication that are found across the federal government.

This Part relies on a variety of sources, including legal sources, public agency documents, and secondary literature. It also relies on original interviews conducted with agency staff, including at the Environmental Protection Agency ("EPA"), the Equal Employment Opportunity Commission ("EEOC"), the Internal Revenue Service ("IRS"), the

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98 White House Legal Aid Interagency Roundtable, Access to Justice Through Simplification 7 (2022), https://www.justice.gov/archives/atj/media/1281946/dl?inline [https://perma.cc/HF4K-ZSZ8].

99 Administrative Conference Recommendation 2023-6: Identifying and Reducing Burdens on the Public in Administrative Processes, 89 Fed. Reg. 1511, 1513 (Jan. 10, 2024).

100 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–3521).

101 *Id.*

102 44 U.S.C. § 3503.

103 Admin. Conf. of the U.S., Paperwork Reduction Act Basics (2022), https://www.acus.gov/sites/default/files/documents/25%20PRA%20Basics.pdf [https://perma.cc/3VQ3-ATB4].

National Labor Relations Board ("NLRB"), the SSA, and the Department of Agriculture ("USDA"), as well as informal conversations with staff at several other agencies. All interviews were conducted on background only, and as such, any information from those interviews is included anonymously.[104]

The agencies typify the many kinds of adjudication that agencies engage in and the wide variety of contexts in which they operate. For example, some agencies used as examples in this Article are primarily engaged in adjudicating benefits applications, both the frontline initial decisions that are often made on a paper record and the administrative appeals from those decisions challenging the initial denials.[105] Such agencies include the SSA, the Pension Benefit Guarantee Corporation ("PBGC"), the ED, and the VA. Other agencies primarily investigate and bring enforcement actions that they also adjudicate. These agencies include the EPA, the USDA, the IRS, and Customs and Border Protection ("CBP"), though a fifth, the Executive Office for Immigration Review ("EOIR"), adjudicates immigration enforcement and benefits decisions without taking part in the investigative or prosecutorial role.[106] Still others adjudicate disputes about federal rights that are between two private parties, such as the EEOC and the NLRB. And at least one is engaged primarily in public licensing, the Federal Energy Regulatory Commission ("FERC").

Despite this generalization, adjudication does not stay in one lane, even within a single agency. For example, CBP not only enforces immigration and customs laws, but also administers certain benefits programs such as Global Entry.[107] ED not only administers benefits associated with federal student financial aid programs, but also enforces civil rights laws through its Office for Civil Rights ("OCR").[108] EEOC adjudicates

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104 These interviews were conducted pursuant to a ruling by The Ohio State University Institutional Review Board that this Author's interviews were exempt from Institutional Review Board approval procedures. *See* Email from Anthony Dent, Office of Responsible Research Practices, The Ohio State University, to Author (Mar. 6, 2025, at 14:54 MST) (on file with the Author). To preserve the confidentiality of government employees, encourage candor in the interviews, and avoid any possible negative consequence of participating in this Article's study, the condition of conducting interviews on background was necessary. Wherever feasible, the information gleaned from the interviews was corroborated by additional sources and cited as such.

105 *See, e.g.*, *The Administrative Review Process*, Soc. Sec. Admin.: N.Y. Region, https://www.ssa.gov/ny/services-odar.htm [https://perma.cc/LC4P-Z6YP] (last visited June 9, 2026).

106 *See About the Office*, Exec. Off. for Immigr. Rev., DOJ (May 29, 2025), https://www.justice.gov/eoir/about-office [https://perma.cc/74K8-M4ZA].

107 *See Global Entry*, U.S. Customs & Border Prot. (July 9, 2025), https://www.cbp.gov/travel/trusted-traveler-programs/global-entry [https://perma.cc/654V-AUM4].

108 *See An Overview of the U.S. Department of Education: How Does ED Serve Students?*, U.S. Dep't of Educ. (May 8, 2026), https://www.ed.gov/about/ed-overview/overview-of-us-department-of-education-how-does-ed-serve-students [https://perma.cc/56JB-G4FS]; *Office for Civil Rights (OCR) Functional Statements*, U.S. Dep't of Educ. (Jan. 7, 2026), https://www.ed.gov/about/

private disputes, but it also adjudicates employment discrimination claims brought by federal workers against their federal agency employer.[109] And the SSA not only adjudicates initial benefits determinations and appeals, but also may bring an action to recoup overpayment of past benefits.[110] Indeed, every agency on this list has functions that bleed between these categories. Capitalizing on this variety, these case studies enable a sampling of adjudication types and their records practices.

The transsubstantive nature of this Article reveals certain themes among seemingly disparate agency proceedings. This Article typologizes agency practices in adjudications into seven distinct methods for providing access to necessary federal records.[111] The first option is that the agency obtains the relevant records itself, relieving the member of the public from the burden of doing so.[112] Sometimes agencies perform this function by having their staff conduct the necessary legwork to obtain government records, and sometimes agencies achieve this result through computer matching programs that prepopulate an individual's file with data from the relevant government sources.[113]

Agency information gathering is conceptually distinct from the remainder of the strategies, all of which involve methods of giving access to the member of the public who may then do with it whatever they need. These remaining six methods are (1) providing formal discovery procedures within the agency proceeding, (2) informal document sharing between an agency official working the case and the concerned private party, (3) providing portal access for individuals to gain access to records that the agency holds about their own matters, (4) engaging in proactive disclosure or public docketing of records that the members of the public need for their proceedings, (5) relying on the FOIA request process to provide a means for the individual to access necessary records, and (6) providing some direct request or non-FOIA request method for requesting the necessary records.[114] This Part explores agency practices as to each method in turn, creating a framework for understanding information collection and access approaches.

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ed-organization/functional-statements/office-civil-rights-ocr-functional-statements [https://perma.cc/22SV-5258].

109 *See Enforcement*, EEOC, https://www.eeoc.gov/enforcement [https://perma.cc/R94U-DYEA] (last visited May 10, 2026).

110 *Resolve an Overpayment*, Soc. Sec. Admin., https://www.ssa.gov/manage-benefits/resolve-overpayment [https://perma.cc/G5HR-BRCQ] (last visited July 1, 2026).

111 *See supra* Part I.

112 *See supra* Section I.A.

113 *Id.*

114 *See supra* Sections I.B–.G.

A. Agency Document Gathering

An agency may take on the burden of collecting government records relevant to a particular proceeding in lieu of requiring the private party to the proceeding to do so. This strategy is particularly effective at some agencies in helping applicants access benefits to which they are entitled. There are four principal strategies for the agencies that employ this method. The first is assisting the applicant in developing the record by individually obtaining records from other agencies and from within the same agency. The second is automatically importing existing federal records into a file to prepopulate a form to alleviate burdens on the member of the public. The third is using computer matching agreements to cross-verify information submitted by the applicant with existing federal records. And the final strategy is informal case referral between enforcement agencies, acting as tip submitters for one another.

The SSA and the VA are prime examples of the first strategy, assisting benefits applicants in individualized records gathering. For its part, the SSA is responsible for administering both age-based Social Security benefits and disability-based benefits.[115] Because traditional age-based eligibility is a more automatic and formulaic determination, the overwhelming majority of contested proceedings concern disability-based benefits.[116]

By administering these programs, the SSA engages in an almost unfathomably large number of proceedings. In a given year, the SSA may receive around two million applications for a disability-related benefit that require an initial determination[117] and around 350,000 appeals from those determinations that require a hearing before an ALJ.[118] Another 80,000 cases or so are further appealed to the SSA Appeals Council.[119]

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115 The age-based benefits are pursuant to Old Age and Survivors Insurance; disability-based benefits include both Social Security Disability Insurance and Supplemental Security Income. 42 U.S.C. § 402 (describing old-age and survivor benefits); *id.* § 405 (giving the Commissioner of Social Security the authority to administer benefits programs); *id.* § 423(a) (describing disability benefit payments).

116 Soc. Sec. Admin., SSA Pub. No. 13-11700, Annual Statistical Supplement to the Social Security Bulletin, at 2.74 tbl. 2.F9 (2024), https://www.ssa.gov/policy/docs/statcomps/supplement/2024/supplement24.pdf [https://perma.cc/2NDC-EERC].

117 Soc. Sec. Admin., SSA Pub. No. 13-11826, Annual Statistical Supplement to the Social Security Bulletin, at 2.71 tbl. 2.F5 (2023), https://www.ssa.gov/policy/docs/statcomps/supplement/2023/supplement23.pdf [https://perma.cc/C468-NK36].

118 In fiscal year 2023, the SSA received 355,565 hearing requests and dispositioned 377,685 cases. Soc. Sec. Admin., *supra* note 117, at 2.74 tbl. 2.F9.

119 In fiscal year 2023, the SSA Appeals Council received 68,192 appeal requests and dispositioned 79,764. *Id.* at 2.75 tbl. 2.F11.

To accomplish this feat, the SSA employs nearly 1,100 ALJs, more than all Article III judges at every level of the judiciary combined.[120]

Initial or frontline decisions are made by an employee at a Social Security office who determines if the applicant meets nonmedical criteria—such as age and work credits—and then a state office processes the application to determine disability; that review includes an analysis of medical records and even sometimes a medical exam, after which a determination is made.[121] Appeals of those determinations trigger an evidentiary hearing before an ALJ.[122]

At all stages of proceedings, the applicant and the agency technically share the responsibility for gathering records, though the agency essentially volunteers to take the laboring oar.[123] Although the applicant has the duty to "prove to [the SSA] that [the applicant is] blind or disabled," the applicant need not necessarily submit medical records but only "medical source(s)" and other basic biographical information and information about work activities.[124] The agency "will develop [the applicant's] complete medical history" by "mak[ing] an initial request for evidence from [their] medical source" and one follow-up request.[125] Notably, these requests could be made of any medical provider, private or public, including federal agencies that provide direct medical services such as the VA, Indian Health Service, or the Bureau of Prisons. The SSA's access to all these health records from providers—both federal agencies and private doctors—is contingent on the applicant completing a form granting authorization for the agency to obtain those records on the applicant's behalf, which provides formal consent.[126]

The VA takes an analogous approach to records collection concerning disability benefits applications.[127] In these proceedings, the agency also has a duty to assist under which the applicant can ask the

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120 In fiscal year 2023, there were 1,088 SSA ALJs. *Id.* at 2.73 tbl. 2.F8; *cf. Authorized Judgeships*, U.S. Cts. (2025), https://www.uscourts.gov/sites/default/files/2025-01/allauth.pdf [https://perma.cc/8AK3-ZSDV] (documenting a total of 870 Article III judgeships in 2024).

121 *Disability Determination Process*, Soc. Sec. Admin., https://www.ssa.gov/disability/determination.htm [https://perma.cc/9LND-SCP7] (last visited June 2, 2026).

122 42 U.S.C. § 405(b)(2).

123 *See* 20 C.F.R. § 416.912(a)–(b) (2025).

124 *Id.* § 416.912(a).

125 *Id.* § 416.912(b); *see also* Notice of Social Security Ruling (SSR), 82 Fed. Reg. 46,339, 46,339 (Oct. 4, 2017) (clarifying the responsibilities of a benefit claimant to develop medical history support for claims).

126 *See* Soc. Sec. Admin., Authorization to Disclose Information to the Social Security Administration (SSA) 1–2, https://www.ssa.gov/forms/ssa-827.pdf [https://perma.cc/U2X2-ZGG9] (last visited July 1, 2026).

127 The VA is charged with a wide variety of benefits administration for former military members, including healthcare, disability, retirement, housing assistance, education programs, and more. U.S. Dep't of Veterans Affs., https://www.va.gov/ [https://perma.cc/SYM9-S93M] (last visited May 10, 2026).

VA to gather all records from within the VA itself, the SSA, and any other federal agency including the military, as well as attempt to get nonfederal records on the applicant's behalf.[128]

The second type of federal record gathering by agencies occurs when agencies automatically transfer government-held information—instead of gathering individualized records—to help private parties build their submission. Occasionally it is as simple as transferring information from one benefit-granting agency to another to facilitate further proceedings. For example, veterans with 100 percent disability determinations from the VA are automatically identified to the SSA for expedited processing of their claims.[129] More complex systems, though, prepopulate a file for a member of the public as a way of reducing the administrative burden for private parties.

The IRS provides a ready example. Although the IRS is at a formal comparative information disadvantage vis-à-vis the taxpayer,[130] as the taxpayer should have all of the information needed to determine tax owed,[131] many taxpayers may not receive or retain all of the information that they need to easily or accurately fill out their tax returns.[132] Moreover, tax returns are notoriously complex and difficult to navigate, giving rise to a wide variety of tax preparation services ranging from online tools such as TurboTax to tax-preparing services and accounting firms.[133] The administrative burden associated with filing tax returns has animated longstanding calls for the IRS to provide tax preparation tools of its own and even to prepopulate returns with information the IRS has received from third-party submitters.[134] Prepopulation would

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128 *Standard Disability Claims*, U.S. Dep't of Veterans Affs. (Jan. 10, 2024), https://www.va.gov/disability/how-to-file-claim/evidence-needed/standard-claims/ [https://perma.cc/8RFF-UBTF]; *VA's Duty to Assist*, U.S. Dep't of Veterans Affs. (July 31, 2025), https://www.va.gov/resources/vas-duty-to-assist/ [https://perma.cc/RNJ7-CL95].

129 *Information for Military & Veterans*, Soc. Sec. Admin., https://www.ssa.gov/people/veterans/ [https://perma.cc/98FV-DSUK] (last visited May 10, 2026).

130 *See The Taxpayer Roadmap*, Taxpayer Advoc. Serv., https://www.taxpayeradvocate.irs.gov/get-help/roadmap/ [https://perma.cc/GSK3-XVJ8] (last visited June 3, 2026).

131 *See Estimated Taxes*, IRS (Apr. 2, 2026), https://www.irs.gov/businesses/small-businesses-self-employed/estimated-taxes [https://perma.cc/4GAT-SHK3] (indicating that taxpayers should be able to determine tax owed with the information accessible to them).

132 *See How to File when Taxpayers Have Incorrect or Missing Documents*, IRS (Mar. 25, 2025), https://www.irs.gov/newsroom/how-to-file-when-taxpayers-have-incorrect-or-missing-documents [https://perma.cc/5NYA-4Q2Y].

133 *See* 1 Taxpayer Advoc. Serv., 2012 Annual Report to Congress 3, 6 (2012), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Volume-1.pdf [https://perma.cc/F383-V3PX] ("The most serious problem facing taxpayers—and the IRS—is the complexity of the Internal Revenue Code . . . . [A]bout 59 percent [of individual taxpayers] pay preparers [to prepare their returns] . . . . An additional 30 percent of individual taxpayers use tax software to help them prepare their returns . . . .").

134 *See* Ariel Jurow Kleiman, *Pre-Filled IRS Forms Would Help Taxpayers as Much as Direct File*, Bloomberg Tax (Jan. 3, 2024, at 04:30 ET), https://news.bloombergtax.com/tax-insights-

constitute a form of access for the taxpayer to their own information held by the IRS.[135]

In 2024, the IRS piloted a program called Direct File that was designed to meet this demand for a free tax preparation service offered by the IRS and prepopulate those returns with some information that the IRS already has, such as W-2 information.[136] Evidence suggests that taxpayers are very interested in using such a service.[137] Yet this service is highly politicized and has been terminated.[138] As a result, the initial decision about taxes owed remains one that places great administrative burden on the individual and provides little to no formal access to the individual's own information held by the IRS.

Another prepopulation example arises at ED, which, among its myriad functions, processes Free Application for Federal Student Aid ("FAFSA") forms to determine the eligibility of applicants for higher education for various forms of financial assistance including grants, loans, and work study.[139] Historically, ED relied on applicants to submit all of the required information to qualify for federal student aid, including Social Security numbers, tax returns, and balances on various types of accounts and investments.[140] In 2019, however, Congress passed a statute that required ED to obtain IRS data pertaining to FAFSA

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and-commentary/pre-filled-irs-forms-would-help-taxpayers-as-much-as-direct-file [https://perma.cc/GK9R-GFYK].

135 *Id.*

136 *See IRS Makes Direct File a Permanent Option to File Federal Tax Returns; Expanded Access for More Taxpayers Planned for the 2025 Filing Season*, IRS (May 30, 2024), https://www.irs.gov/newsroom/irs-makes-direct-file-a-permanent-option-to-file-federal-tax-returns-expanded-access-for-more-taxpayers-planned-for-the-2025-filing-season [https://perma.cc/568F-9LVL]; *IRS Direct File—A Free, Easy and Secure Way to Prepare and File 2024 Taxes Online*, IRS (Mar. 2025), https://www.irs.gov/newsroom/irs-direct-file-a-free-easy-and-secure-way-to-prepare-and-file-2024-taxes-online [https://perma.cc/WN9T-QH59].

137 Aravind Boddupalli, Margot Crandall-Hollick, Michael Karpman & Noah Kennedy, *Most Americans Are Interested in Using IRS Direct File to Prepare and File Their Taxes*, Tax Pol'y Ctr. (Mar. 2025), https://taxpolicycenter.org/sites/default/files/2025-03/MOST-AMERICANS-ARE-INTERESTED-IN-USING-IRS-DIRECT-FILE-TO-PREPARE-AND-FILE-THEIR-TAXES.pdf [https://perma.cc/3NY4-HUA7].

138 *See* Vanessa Williamson, *The Battle Over Direct File and the Future of Free Public Tax Filing*, Brookings (Mar. 4, 2025), https://www.brookings.edu/articles/the-battle-over-direct-file-and-the-future-of-free-public-tax-filing/ [https://perma.cc/GJW5-CQVZ]; Kamaron McNair, *'I Don't Care About Direct File': IRS Chief Says Agency Plans to End Free Filing Program*, CNBC Make It (July 30, 2025, at 16:40 ET), https://www.cnbc.com/2025/07/30/irs-chief-says-agency-plans-to-end-free-direct-file-program.html [https://perma.cc/T8G7-AE2B]; *Trump White House Officially Ends Direct File Program*, Ams. for Tax Fairness (July 31, 2025), https://americansfortaxfairness.org/trump-white-house-officially-ends-direct-file-program/ [https://perma.cc/38E9-RDD5].

139 *What Is the FAFSA Form and Why Should I Fill It Out?*, Fed. Student Aid, U.S. Dep't of Educ., https://studentaid.gov/help/fafsa [https://perma.cc/H2N7-ZL8H] (last visited June 3, 2026).

140 *Filling Out the FAFSA Form*, Fed. Student Aid, U.S. Dep't of Educ., https://studentaid.gov/apply-for-aid/fafsa/filling-out [https://perma.cc/T2E3-FUQ2] (last visited June 3, 2026).

applications through direct secure data exchanges to simplify the federal student aid application process.[141]

In 2021, ED began working on a replacement system, which it rolled out on December 30, 2023, after a delay that caused FAFSA to be unavailable for three months during which students typically are able to access it; when ED finally rolled the replacement system out, it was riddled with errors that affected students' ability to access federal student aid.[142] Although the Government Accountability Office eventually identified some forty separate failures in the rollout,[143] the program is now running relatively smoothly.[144] The heart of the program is called the IRS Data Retrieval Tool, through which the FAFSA form itself has an option to "Link to IRS" to import return information automatically rather than having to locate past tax returns and submit them as separate documentation.[145] It is also governed by a matching program agreement,[146] and, importantly, accessing FAFSA benefits is contingent on consenting to the use of IRS data.[147] The IRS Direct File program and the FAFSA prefill program are both, at base, designed to alleviate administrative burden on the public and assist them in their agency proceedings.

Other automatic information sharing systems, however, have dual purposes. Although they may in some ways try to alleviate a burden on

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141 *See* Fostering Undergraduate Talent by Unlocking Resources for Education Act, Pub. L. No. 116-91, 133 Stat. 1189 (2019) (codified at 20 U.S.C. § 1001).

142 *Botched FAFSA Rollout Leaves Uncertainty for Students Seeking Financial Aid for College*, U.S. Gov't Accountability Off. (Sep. 24, 2024), https://www.gao.gov/blog/botched-fafsa-rollout-leaves-uncertainty-students-seeking-financial-aid-college [https://perma.cc/KJR4-TTNJ].

143 *Id.*

144 *See FAFSA Issue Alerts*, Fed. Student Aid, U.S. Dep't of Educ. (Aug. 7, 2025), https://fsapartners.ed.gov/knowledge-center/topics/fafsa-simplification-information/fafsa-issue-alerts [https://perma.cc/C6L9-FEYD] (indicating that all but one of the issues have been resolved; the outstanding issue was for people who did not have Social Security numbers but do have an individual taxpayer identification number).

145 *Tax Information for Federal Student Aid Applications*, IRS (Sep. 3, 2024), https://www.irs.gov/individuals/tax-information-for-federal-student-aid-applications [https://perma.cc/RRF4-ZUXP]; *How Does the IRS Data Retrieval Tool Work?*, Fed. Student Aid, U.S. Dep't of Educ., https://studentaid.gov/2223/help/how-irs-drt-work [https://perma.cc/NHJ6-XZTY] (last visited June 3, 2026); *see* 26 U.S.C. § 6103(h)(1) (authorizing the IRS to share this information); *Computer Matching Notices and Agreements*, U.S. Dep't of Educ. (Jan. 30, 2025), https://www.ed.gov/about/ed-overview/required-notices/privacy-program/computer-matching-notices-and-agreements [https://perma.cc/XN86-2VFK]; Notice of a New Matching Program, 88 Fed. Reg. 42,052, 42,053–54 (June 29, 2023).

146 *Computer Matching Notices and Agreements*, U.S. Dep't of Educ. (Jan. 30, 2025), https://www.ed.gov/about/ed-overview/required-notices/privacy-program/computer-matching-notices-and-agreements [https://perma.cc/XN86-2VFK]; *How to Use the IRS Data Retrieval Tool on the FAFSA*, Elizabethtown Coll., https://www.etown.edu/offices/financial-aid/How%20to%20Use%20the%20IRS%20Data%20Retrieval%20Tool%20on%20the%20FAFSA.pdf [https://perma.cc/K45L-P4DR] (last visited June 3, 2026).

147 *See How to Use the IRS Data Retrieval Tool on the FAFSA*, *supra* note 146.

the affected member of the public, they often are also seeking to verify, audit, or otherwise detect discrepancies that might negatively affect the member of the public. The line is, of course, a blurry one; even individualized record gathering may produce a negative determination on eligibility of benefits, but the primary purpose is to aid the applicant, not detect ineligibility.

The IRS, again, provides a prime example. As to initial determinations of the amount of tax owed, the taxpayer conducts the process through the familiar filing of tax returns and related information.[148] Yet the IRS receives information from a variety of additional sources against which it cross-references those returns, including information submitted by payors, banks, employers, and others required to report taxable income paid to others.[149] This includes, of course, other federal agencies, such as agencies that provide income benefits—including the SSA—or all agencies that act as employers of federal workers who generate W-2s. That is to say that the federal records the IRS needs to determine the tax owed must be provided automatically by the generating agency, and the IRS need not go hunting for them. And, of course, the IRS's record-gathering practice in this regard is not rooted in consent; rather, it is mandated by law, and the result may be enforcement related. Errors or discrepancies found through this process or credits or deductions determined to be questionable may result in an IRS assessment of additional tax owed,[150] or the return may be sent to a tax examiner for an audit, formally called an exam.[151]

In another set of examples, a host of federal agency adjudications across a variety of contexts need the federal records that the IRS primarily maintains. Often this information is shared through technological advances and Matching Act agreements. Computer matching programs may provide information that can be used to identify individuals who may be entitled to benefits, or at least to prepopulate some

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148 Boddupalli et al., *supra* note 137.

149 *See A Guide to Information Returns*, IRS (Oct. 28, 2025), https://www.irs.gov/businesses/small-businesses-self-employed/a-guide-to-information-returns [https://perma.cc/G6ZG-7Y3P] ("Any person engaged in a trade or business, including a corporation, partnership, individual, estate, and trust, who makes reportable transactions during the calendar year must file information returns to report those transactions to the IRS.").

150 *See, e.g.*, *Lifecycle of a Tax Return: Correspondence Audits: Increased Communication Alternatives Are in Progress*, Taxpayer Advoc. Serv.: NTA Blog (Jan. 7, 2026) [hereinafter *Lifecycle of a Tax Return*], https://www.taxpayeradvocate.irs.gov/news/nta-blog/nta-blog-lifecycle-of-a-tax-return-correspondence-audits-increased-communication-alternatives-are-in-progress/2021/09/ [https://perma.cc/X7AQ-B9EV]; *Notice of Deficiency: Increase in Tax and Notice of Your Right to Challenge*, IRS, https://www.irs.gov/pub/notices/cp3219n_english.pdf [https://perma.cc/BVB7-BMMX] (last visited Apr. 17, 2026).

151 *See Lifecycle of a Tax Return*, *supra* note 150; *Top 4 Red Flags That Trigger an IRS Audit*, Intuit TurboTax (May 7, 2026, at 16:10 ET), https://turbotax.intuit.com/tax-tips/irs-letters-and-notices/top-red-flags-that-trigger-an-irs-audit/L2TzlqFNe [https://perma.cc/3UKN-FKVJ].

of the information that an agency needs to decide if an applicant for benefits meets the required criteria.

For example, the statutory provision governing confidentiality of tax return information provides numerous exceptions to the ban on the IRS sharing such data, one of which applies specifically to sharing information with the SSA regarding unearned income for the purposes of determining eligibility for benefits programs.[152] Under that authority and pursuant to the constraints of the Matching Act, the SSA and the IRS had a Matching Act agreement that upon the SSA's provision of certain data concerning an applicant for Supplemental Security Income, the IRS provided the return information concerning unearned income pertaining to that individual.[153] Another such agreement allows for IRS information to be shared to verify eligibility for Medicare Part D Low Income Subsidy.[154] Similarly, the VA engages in numerous Matching Act agreements to, for example, facilitate verification of eligibility for benefits applicants.[155] One such agreement governs the VA's use of IRS information to verify data about income for the purpose of determining certain needs-based benefits.[156] These programs are not based on the consent of the user and have the express purpose of ferreting out ineligibility, overpayment, or undercollection.

Finally, some enforcement agencies refer matters to one another informally, tipping off another agency of a possible legal violation that they encountered during their own work. This largely happens between agencies with some shared jurisdiction. For example, the Occupational Safety and Health Administration ("OSHA") might have information about an employee complaint regarding working conditions that could be relevant to the statutory labor rights protected by the NLRB. Information sharing between these agencies is governed by a memorandum of understanding, which specifies that "information or data that supports each agency's enforcement mandates" may be shared "either upon request or upon the respective agency's own initiative," including complaint or investigative files.[157] It further requires a "careful review"

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152 26 U.S.C. § 6103(l).

153 Privacy Act of 1974, 5 U.S.C. § 552a; Notice of a New Matching Program, 88 Fed. Reg. 22,079, 22,079 (Apr. 12, 2023). This agreement has expired and does not appear to have been renewed.

154 *See* Privacy Act of 1974, 5 U.S.C. § 552a(a)(8); Notice of a New Matching Program, 90 Fed. Reg. 15,505, 15,505 (Apr. 11, 2025).

155 *Computer Matching Agreements (CMA)*, U.S. Dep't of Veterans Affs., https://department.va.gov/privacy/cma/ [https://perma.cc/M8TH-JMA8] (last visited May 10, 2026).

156 *See* 5 U.S.C. § 552a(a)(8); Notice of a New Matching Program, 88 Fed. Reg. 31,310, 31,310 (May 16, 2023).

157 Memorandum of Understanding Between the NLRB and the Occupational Safety & Health Admin., U.S. Dep't of Lab. 2 (Oct. 31, 2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-7857/osha-mou-signed-10-31.pdf [https://perma.cc/94R8-XFUU].

for necessity to ensure the information is being used for a proper purpose.[158] Similarly, OSHA will sometimes share information with the EPA, which has concurrent regulatory authority over the same entity, which may prompt an EPA investigation.[159]

B. Administrative Discovery

When agencies are not compiling the file for a private party, the private party is often seeking access to the relevant information the agency holds. The remainder of this Part documents the ways that agencies provide, or do not provide, access to those relevant records. First, agencies sometimes have very formal disclosure rules concerning a particular proceeding. These kinds of access rules tend to exist, however, in proceedings that have already reached a relatively high level of formality—at the very least an evidentiary hearing—and in situations in which it is more likely that parties are represented.

Proceedings that make it to an ALJ hearing at almost any agency, including at some of the agencies studied above, will typically be governed by rules that the agency has promulgated that provide for discovery rights, even though the APA does not specify them.[160] The benefits of these much more formalized processes are those long recognized by ACUS:

> Prehearing discovery in agency adjudication insures [sic] that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.[161]

Among the case studies used in this Article, though, this type of formal administrative discovery tends to exist in small volume adjudication

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158 *Id.*

159 *See Monitoring Compliance*, EPA (Mar. 18, 2025), https://www.epa.gov/compliance/monitoring-compliance [https://perma.cc/9RTP-BD3T]; Memorandum of Understanding Between the EPA, Off. of Chem. Safety & Pollution Prevention, Off. of Enf't & Compliance Assurance, and the U.S. Dep't of Lab., Occupational Safety & Health Admin. (Dec. 17, 2024), https://www.epa.gov/system/files/documents/2025-01/epa-and-osha-tsca-section-6-mou.pdf [https://perma.cc/786L-JFZD].

160 For example, the FTC has regulations governing ALJ proceedings with broad, federal-court-style discovery rights, as do the EPA and USDA. *See, e.g.*, 16 C.F.R. § 3.31 (2025); 40 C.F.R. §§ 164.50(b), 209.21–.22 (2025); 7 C.F.R. § 1.319(b)(7) (2025).

161 Discovery in Agency Adjudication, 38 Fed. Reg. 19,786, 19,786 (July 23, 1973).

programs, particularly those involving enforcement actions against business interests.

For example, at the EPA, many statutes that regulate chemicals are enforceable administratively, rather than by bringing an enforcement action in federal court. For these cases, enforcement typically begins with a negotiation over possible violations.[162] For those cases not resolved in this more informal way, the EPA files a complaint before the EPA's ALJs.[163] In those formal ALJ enforcement proceedings, discovery is available subject to the ALJ's supervision.[164]

Similarly, one unit of the USDA is Animal Care, which administers the Animal Welfare Act[165] and the Horse Protection Act,[166] among other laws.[167] Both of these statutes depend on inspection systems that determine compliance, as well as enforcement actions that stem mostly from those inspection events. Inspections can be routine or prompted by a tip or complaint made by another agency or a member of the public.[168] When the USDA finds violations, the vast majority of the information related to that violation comes from the evidence collected during the inspection.[169] The Agency can then bring an enforcement action, ranging from an official warning letter to a stipulated settlement to an administrative complaint before an ALJ.[170] At the ALJ stage, formal discovery mechanisms are available.[171]

Another example in this regard is found at FERC. FERC regulates the major energy sectors of electric, oil, hydropower, and natural gas.[172]

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162 *See infra* note 179 and accompanying text.

163 This includes, for example, the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6987, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y. *See Waste, Chemical, and Cleanup Enforcement*, EPA (Apr. 3, 2026), https://www.epa.gov/enforcement/waste-chemical-and-cleanup-enforcement [https://perma.cc/5T2F-W6CQ]; 7 U.S.C. § 1361(a)(3); 42 U.S.C. § 6928(b); 15 U.S.C. § 2615(a)(2)(A).

164 40 C.F.R. § 22.19 (2026); Off. of Admin. L. Judges, EPA, Practice Manual: A Guide to Frequently Asked Practice Questions 25–26, 33–34 (2022), https://www.epa.gov/sites/default/files/2013-09/documents/alj-practice-manual_0.pdf [https://perma.cc/ZHF2-956U].

165 7 U.S.C. §§ 2131–2159; 18 U.S.C. § 49.

166 15 U.S.C. §§ 1821–1831.

167 *Animal Welfare Act Enforcement*, Animal & Plant Health Inspection Serv., U.S. Dep't of Agric. (Nov. 17, 2025), https://www.aphis.usda.gov/awa/enforcement [https://perma.cc/6KAF-GGTW]; *Horse Protection Act*, Animal & Plant Health Inspection Serv., U.S. Dep't of Agric. (Jan. 28, 2026), https://www.aphis.usda.gov/hpa [https://perma.cc/PUR2-BKND].

168 *AWA Inspection and Annual Reports*, Animal & Plant Health Inspection Serv., U.S. Dep't of Agric. (Jan. 11, 2026), https://www.aphis.usda.gov/awa/annual-inspection-reports [https://perma.cc/7LC5-63HM].

169 *See Animal Welfare Act Enforcement*, *supra* note 167.

170 *See id.*

171 Off. of Admin. L. Judges, *supra* note 164, at 33–34.

172 *What FERC Does*, FERC (June 18, 2025), https://www.ferc.gov/what-ferc-does [https://perma.cc/XFZ5-MYHM].

Among other functions, FERC brings enforcement actions, mostly concerning energy market manipulation, energy reliability standards violations, and anticompetitive conduct.[173] When FERC opens an investigation but concludes that no action should be taken, FERC notifies the subject of the investigation.[174] Where further action is warranted, however, FERC provides the subject with a set of preliminary findings concerning the violation and gives the party an opportunity to respond.[175] FERC may engage in further fact gathering at that stage.[176] If sanctions are deemed warranted after considering the subject's response, FERC may enter settlement negotiations, and if they are not successful, FERC may issue a complaint before an ALJ, which is a docketed proceeding with judge-supervised discovery.[177]

C. Informal Disclosure

For some agency proceedings, although formal discovery rights are not provided, informal access to a case file or portions thereof is available directly from the agency official or office handling the case. This is particularly true for agencies included in this Article that engage in proceedings that do not entail an evidentiary hearing or at a stage prior to such a hearing.[178]

In fact, one significant category of informal disclosure occurs as to the very same proceedings that provide formal administrative discovery at the ALJ stage, but prior to the initiation of formal enforcement proceedings. Indeed, at all three agencies described above—EPA, USDA, and FERC—physical inspections typically form the basis for the file on which the agency brings an enforcement action. When those agencies are conducting inspections and investigating possible legal violations, information tends to be shared directly with the parties in an informal practice.

Beginning with the EPA, informal information sharing takes center stage during the negotiation phase over violations of chemicals

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173 FERC, Dkt. No. AD07-13-018, 2024 Report on Enforcement: A Staff Report to the Commission 4 (2024), https://www.ferc.gov/sites/default/files/2024-11/2024%20Report%20on%20Enforcement_1121.pdf [https://perma.cc/G8RP-MH9J].

174 *See id.* at 6.

175 *Id.*

176 *Id.*

177 *Id.* at 6–8; *Administrative Litigation*, FERC (Mar. 10, 2026), https://www.ferc.gov/administrative-litigation-0 [https://perma.cc/4Z7Z-UPBH].

178 There are, however, exceptions. For example, at the SSA, information sharing was relatively informal despite the connection with an evidentiary proceeding. *See Privacy Program: A Central Source for Information About SSA's Privacy Compliance Program*, Soc. Sec. Admin., https://www.ssa.gov/privacy/submit_privacy_act_request.html [https://perma.cc/JT56-YTL3] (last visited May 10, 2026).

statutes.[179] The EPA often conducts inspections as a result of information from tips, state environmental agencies, or information it gathers from its monitoring activities tending to indicate possible violations.[180] Inspections are costly and involved, and they require preinspection preparations, the inspection event itself, and postinspection follow-up.[181] During all of these phases, the inspector and the regulated facility interact. For example, prior to the inspection, the EPA will issue a letter requesting information about the facility's chemicals, volumes, and other background materials.[182] During the inspection, the inspector will produce notes.[183] And after the inspection, there may be additional exchange of documents as follow-up.[184] Ultimately, all of this information goes into the final inspection report, which the EPA will give to the facility.[185] The inspection report will not make findings of violations per se, but will identify areas of concern that need to be followed up on.[186]

A case enforcement officer reviews every inspection report and makes a judgment about whether the EPA should take further action. If there is further action, case development will ensue, and records will be gathered from the relevant program office at the EPA; these records may concern past contact with the regulated entity or previous submissions, the EPA's own data on historical noncompliance, other cases that have been brought against the entity, and anything else within the Agency that might be relevant.[187] Then, the case enforcement officer will eventually decide what further action to take, sometimes as little as a warning letter or as much as filing a complaint before an ALJ, but in

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179 *See* EPA, Memorandum on Best Practices for Compliance and Enforcement-Related Information Requests 1–2 (Nov. 21, 2018), https://www.epa.gov/sites/default/files/2018-11/documents/bestpracticesforcomplianceandenforcementrelatedinformation.pdf [https://perma.cc/DP2D-GKEP].

180 *Overview of the Enforcement Process for Federal Facilities*, EPA (Apr. 20, 2026), https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities [https://perma.cc/3LYK-DE83]; *Monitoring Compliance*, EPA (Mar. 17, 2026), https://www.epa.gov/compliance/monitoring-compliance [https://perma.cc/Q4PS-GZCX].

181 *Monitoring Compliance*, *supra* note 180; Off. of Enf't, EPA, EPA-300/9-89-003-R, Multi-Media Investigation Manual 3–5 (1992).

182 *See Monitoring Compliance*, *supra* note 180.

183 Off. of Enf't, *supra* note 181, at 27.

184 *Id.* at 39–40.

185 EPA, Memorandum on Final Policy on Civil Inspection Report Timeliness 1–2 (Aug. 3, 2022), https://www.epa.gov/sites/default/files/2018-07/documents/inspectionreportpolicy.pdf [https://perma.cc/U73V-B755].

186 *Id.*

187 Toxics & Pesticides Enf't Division, Off. of Regul. Enf't, EPA, Case Development Training Manual, at III-7 (1997), https://nepis.epa.gov/Exe/tiff2png.cgi/91021DDN.PNG?-r+75+-g+7+D%3A%5CZYFILES%5CINDEX%20DATA%5C95THRU99%5CTIFF%5C00003021%5C91021DDN.TIF [https://perma.cc/B7DS-HVNB].

most cases the case enforcement officer works toward a settlement.[188] In that process, there is a lot of back-and-forth and information sharing, but it is informal and not governed by the rules of discovery.[189]

Other agencies with extensive investigation and settlement negotiations prior to filing enforcement proceedings before an ALJ have very similar informal information sharing practices. Indeed, USDA's Animal Care unit has a nearly identical practice: Until hearing proceedings before an ALJ begin, there is no formal discovery available, but the negotiations over settlements and stipulated penalties involve informal information sharing. Likewise, a very similar dynamic plays out at FERC.[190]

Beyond the proceedings prior to ALJ enforcement actions, however, other agencies deploy informal information sharing strategically to resolve matters with regulated parties. For example, another unit of USDA—the National Organic Program ("NOP")—creates national standards for the sale of organic food and accredits third-party certifiers that are the primary administrators of those standards.[191] NOP does, however, also enforce organic standards, including investigating uncertified businesses making organic claims, organic-claimed products containing pesticide residues, fraud, and labeling errors.[192] The Program receives information that leads to investigations from a variety of sources, including complaints made to it and its own market surveillance.[193] The investigations often involve looking at public information—such as marketing information on websites—and also making requests from certifiers who will have documents such as the last inspection report the certifier conducted and any other records the certifier has that are

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188 *Overview of the Enforcement Process for Federal Facilities*, *supra* note 180; *Fact Sheet: EPA's Civil Enforcement Program*, EPA (June 2025), https://www.epa.gov/enforcement/fact-sheet-epas-civil-enforcement-program [https://perma.cc/P8A8-NKGD] ("Once EPA collects evidence showing that a regulated party violated an environmental law or regulation and notifies them, the agency first tries to resolve the violations through a settlement."); EPA, Policy on Civil Penalties: EPA General Enforcement Policy #GM—21, at 5–7 (Feb. 16, 1984), https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf [https://perma.cc/UFH7-HLX4].

189 *See* EPA, *supra* note 179 ("Regions and [Office of Civil Enforcement] divisions frequently find that they can successfully and efficiently gather compliance information without the use of a formal information request . . . .").

190 *See supra* text accompanying notes 172–77.

191 *National Organic Program*, Agric. Mktg. Serv., U.S. Dep't of Agric., https://www.ams.usda.gov/about-ams/programs-offices/national-organic-program [https://perma.cc/Z75J-Z6YZ] (last visited June 9, 2026).

192 U.S. Dep't of Agric., Organic Integrity Dashboard (2022), https://www.ams.usda.gov/sites/default/files/media/QuarterlyEnforcementReportQ4.pdf [https://perma.cc/NKA3-ECEF].

193 *Id.*

relevant.[194] Proposed adverse actions, such as suspensions and revocations of certifications, can be appealed to an agency administrator, which, as the Agency says, "provides due process to organic certifiers, farms, and businesses."[195] The notice that the Agency provides to the target of the investigation typically explains the basis for the investigation. Because communications between the Agency and the target are typically in search of a resolution to come into compliance, information is shared informally.

Agencies sometimes deploy informal information sharing when dealing with individual members of the public rather than regulated entities. For example, when the EEOC investigates a charge of discrimination filed by a member of the public, no formal mechanism for accessing information is available during the pendency of the investigation; instead, informal information sharing from the EEOC investigator to the parties plays a prominent role in the means for private parties to access information related to their proceedings.[196] In another even less formal example, ED's Federal Student Aid office offers both customer service and an ombudsman office to assist borrowers who need help or information about their loans.[197] Additionally, in an example that falls somewhere between the informal and the formal, during the pendency of the proceedings before the ALJ at the SSA, a claimant has a right of access to their case file under the SSA's procedural regulations: "You or your representative may review the evidence in your case file, either on the date of your hearing or at an earlier time at your request, and present additional evidence."[198] Typically, an applicant would simply request their file from the local office handling their case and then would be provided access.[199]

A final example of an agency using informal information sharing raises trickier questions about whether the procedure is adequate to protect private party interests. The IRS relies on a somewhat surprising level of informal information sharing during the audit and appeal process. To begin, examinations—the formal name for audits—can take various forms. The most common form is a "correspondence audit," in

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194 *See Organic Enforcement*, Agric. Mktg. Serv., U.S. Dep't of Agric., https://www.ams.usda.gov/services/enforcement/organic [https://perma.cc/M8Z5-8M2A] (last visited May 10, 2026).

195 Agric. Mktg. Serv., U.S. Dep't of Agric., USDA Organic Oversight and Enforcement Update: Summary of Activities, Calendar Year 2022, at 11 (2023), https://www.ams.usda.gov/sites/default/files/media/2023NOPEnforcementReport.pdf [https://perma.cc/686N-CXSV].

196 For a fuller discussion of EEOC investigations, see *infra* text accompanying notes 219–32.

197 *Office of the Ombudsman FSA*, Fed. Student Aid, U.S. Dep't of Educ., https://fsapartners.ed.gov/help-center/fsa-customer-service-center/service-centers-for-students/office-of-the-ombudsman-fsa [https://perma.cc/C5CW-89NF] (last visited June 6, 2026).

198 20 C.F.R. § 404.916(b)(3) (2025).

199 *Privacy Program: A Central Source for Information About SSA's Privacy Compliance Program*, *supra* note 178.

which the IRS informs the taxpayer of the discrepancy or asks for additional information to substantiate something on a return.[200] In those cases, the IRS states the basis for the inquiry in the correspondence and the relevant information is mostly in the taxpayer's hands.[201] In more complex audits, a revenue agent will be assigned to work directly with the taxpayer and a great deal of back-and-forth between them ensues.[202] As a result, the IRS will share the information that the taxpayer needs to respond to the IRS's concerns directly.[203] Moreover, the time to respond to these audit inquiries is relatively constrained, sometimes as little as thirty days.[204] As a result of all of these dynamics, the taxpayer either already has all necessary information or the IRS provides it directly and informally during the audit.

The audit will either resolve the issue, or the IRS will issue a notice of deficiency. In the latter case, the taxpayer can challenge the IRS's determination through more formalized processes. The administrative avenue for challenges to audit determinations, as well as challenges to many other kinds of IRS determinations—such as denials of refunds or penalty assessments—is to seek review at the Independent Office of Appeals ("Appeals").[205] Although this administrative appeal at first blush sounds more like an adversarial hearing, in reality, Appeals employs a conferencing approach to negotiations and seeking to settle these disputes.[206] As such, it is a highly interactive and at times even collaborative process.

Concerns about the lack of consistency in access to records and the fairness to the taxpayer in the disclosure practices, however, led to Congress passing a provision of the 2019 Taxpayer First Act[207] that requires that most taxpayers be provided their case file prior to IRS appeals proceedings, known as the "right to be informed" provision.[208] As a result, concerning access to records at the appeals stage, the IRS now

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200 *Lifecycle of a Tax Return*, *supra* note 150.

201 *See* Julia Kagan, *Correspondence Audit: What It Is, How It Works, FAQs*, INVESTOPEDIA (May 28, 2025), https://www.investopedia.com/terms/c/correspondence-audit.asp [https://perma.cc/9G4N-LSTU]; *Lifecycle of a Tax Return*, *supra* note 150.

202 *See Audits in Person*, TAXPAYER ADVOC. SERV., IRS (Apr. 16, 2026), https://www.taxpayeradvocate.irs.gov/get-help/interacting-with-the-irs/audits-in-person/ [https://perma.cc/2DZK-UQR5].

203 *See id.*

204 *See* Sarah Brady, *How Long Does an IRS Audit Take?*, DEBT.ORG, https://www.debt.org/tax/how-long-does-an-irs-audit-take/ [https://perma.cc/M296-T9C9] (last visited June 6, 2026).

205 *The Taxpayer Roadmap*, *supra* note 130; *Appeals—An Independent Organization*, IRS (Apr. 15, 2026), https://www.irs.gov/appeals/appeals-an-independent-organization [https://perma.cc/4RSW-4XTF].

206 *Appeals Process*, IRS (Oct. 8, 2025), https://www.irs.gov/government-entities/federal-state-local-governments/appeals-process [https://perma.cc/39FD-CP8H].

207 Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019) (codified in scattered sections of 26 U.S.C.).

208 26 U.S.C. § 7803(a)(3)(A), (e)(7)(A).

employs a so-called "respond directly" process, under which most cases are eligible to receive their case file directly from the appeals employee working the case.[209] Still, this access mechanism retains its informal, direct-from-the-agency-employee disclosure characteristics.

D. Portal Access

A third strategy that agencies have deployed to provide access to records needed in agency proceedings is to create portals through which members of the public can access their own records. Agencies have deployed portal strategies in a variety of contexts, including in benefits, enforcement, and adjudicating complaints filed by members of the public.

Concerning benefits-related information, the VA has endeavored to make information readily available to its beneficiaries through an enormous effort to move toward electronic health records, and corresponding "Blue Button" portal access to beneficiaries' own health records.[210] Similarly, PBGC has created a portal, the MyPBA portal, through which beneficiaries can access key documents about their retirement benefits.[211] And finally, the Federal Student Aid division of ED administers a portal so that borrowers can access information about their loans to engage in loan consolidation, find repayment plans, or apply for loan forgiveness programs.[212] Through the portal, students can access a student transaction report for the current year, though previous years are not yet available.[213]

Beyond benefits, agencies deploy portals as a means for providing essentially private docket access to the docketed materials in an adjudication subject to a hearing before an administrative judge. A prime example of this strategy is found at the EOIR, a division of the

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209 *What to Expect from the Independent Office of Appeals*, IRS (Apr. 28, 2026), https://www.irs.gov/appeals/what-to-expect-from-the-independent-office-of-appeals [https://perma.cc/DFL9-6Z3Y]; Taxpayer First Act Provisions, IRS (Mar. 4, 2026), https://www.irs.gov/newsroom/taxpayer-first-act-provisions [https://perma.cc/Y4H5-ZTJZ]; *Routine Access to IRS Records*, IRS (Dec. 6, 2025), https://www.irs.gov/privacy-disclosure/routine-access-to-irs-records [https://perma.cc/R86X-KM3J].

210 *Manage Your Health Records*, U.S. Dep't of Veterans Affs. (Jan. 3, 2025), https://www.myhealth.va.gov/mhv-portal-web/download-your-own-va-medical-records [https://perma.cc/GR3V-WHPB].

211 *MyPBA: My Pension Benefit Access*, Pension Benefit Guar. Corp., https://www.pbgc.gov/mypba [https://perma.cc/SR74-EZDV] (last visited May 10, 2026).

212 *Frequently Asked Questions*, U.S. Dep't of Educ., https://www.ed.gov/about/contact-us/faqs/Federal%20student%20Aid [https://perma.cc/WAJ2-TXJM] (last visited July 4, 2026); *Manage and Repay Your Student Loans*, Fed. Student Aid, U.S. Dep't of Educ., https://studentaid.gov/ [https://perma.cc/K65M-SK6N] (last visited July 4, 2026).

213 *See* U.S. Dep't of Educ., 2025 Chief FOIA Officer Report 20 (2025), https://www.ed.gov/media/document/2025-chief-foia-officer-report-109680.pdf [https://perma.cc/D274-262L].

Department of Justice ("DOJ") that acts as the immigration adjudicator for those proceedings that end up before an immigration judge.[214] Immigration Judges are the hearing officers who hear initial proceedings, and the Board of Immigration Appeals ("BIA"), typically in a paper-only review, decides appeals from those decisions.[215] The subject matter of the proceedings before EOIR is overwhelmingly removal and applications for relief from removal, though cases can also cover other kinds of immigration matters such as applications for admission and visas, adjustments from one visa status to another, and certain administrative fines.[216] Parties often need information pertaining to their own current EOIR proceedings; for those records, EOIR offers portal access through the EOIR Courts and Appeals System, which permits online filing, downloading the record of proceedings, and accessing case information.[217] The system is phasing in enrollment for unrepresented individuals as well.[218]

The EEOC is responsible for enforcing workplace antidiscrimination laws,[219] including the Equal Pay Act,[220] Title VII of the Civil Rights Act of 1964,[221] the Pregnancy Discrimination Act,[222] the Age Discrimination in Employment Act,[223] and the Americans with Disabilities Act.[224] As to the private sector workforce, the EEOC fulfills its mission primarily by investigating complaints filed by employees called charges of discrimination, of which it received 88,531 in fiscal year 2024.[225] If the EEOC concludes that it will not pursue a filed charge, it will close the investigation and notify the party.[226] Otherwise, the EEOC may

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214 Exec. Off. for Immigr. Rev., DOJ, https://www.justice.gov/eoir [https://perma.cc/4TWS-FCXK] (last visited June 9, 2026).

215 *Board of Immigration Appeals*, Exec. Off. for Immigr. Rev., DOJ (Apr. 29, 2026), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/M5PH-KAGB].

216 *Id.*

217 *EOIR Courts & Appeals System (ECAS)—Online Filing*, Exec. Off. for Immigr. Rev., DOJ (Feb. 24, 2025), https://www.justice.gov/eoir/ECAS [https://perma.cc/LC9S-MM9T].

218 *Id.*

219 *Equal Employment Opportunity Laws*, EEOC, https://www.eeoc.gov/equal-employment-opportunity-laws [https://perma.cc/PAH3-BMV5] (last visited June 6, 2026).

220 29 U.S.C. § 206(d).

221 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 20, and 42 U.S.C.).

222 42 U.S.C. § 2000e(k).

223 29 U.S.C. §§ 621–634.

224 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

225 EEOC, Annual Performance Report: Fiscal Year 2024, at 12 (2025), https://www.eeoc.gov/sites/default/files/2025-01/24-126_EEOC_2024_APR_508_1.16.25_508.pdf [https://perma.cc/CBW8-5MJH].

226 *What You Can Expect After You File a Charge*, EEOC, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/JZ3P-87L2] (last visited May 10, 2026).

refer the parties to mediation or investigate the charge.[227] If the EEOC investigates the charge, it will typically require the respondent to file a position statement in its defense against the charge, allow the charging party to file a response to the position statement, and then gather any other necessary information, such as through witness interviews or document requests, including by subpoena if the employer refuses to cooperate with the investigation.[228] An investigation typically takes about ten months, after which, if the EEOC cannot determine if there is cause to believe the law was violated, it will close the investigation and issue a notice of a right to sue, which allows the charging party to bring their own lawsuit if they choose.[229] If the Agency determines that there is cause to believe the law was violated, it may try to settle the case, or it may bring its own lawsuit.[230]

The EEOC and the NLRB, both of which handle complaints filed by members of the public and adjudicate the merits of those complaints between private parties, also deploy portal access for records—or some subset of records—submitted by the parties to the dispute. At the EEOC, the EEOC Public Portal provides access to private parties to upload and access some key charge file documents, including their own contact information, letter of representation from their attorney, documents supporting their charge of discrimination, and, upon request, the respondent's position statement if there is one, as well as their own response.[231] It also allows the charging party to see the status of their charge.[232] Although it does not provide the full so-called "charge file" with investigative records, it does give basic access to the parties.

Similarly, the NLRB investigates charges of unfair labor practices ("ULPs") that allege violations of the National Labor Relations Act,[233] typically covering matters such as interfering with employees' right to organize, discriminating against union members, or refusing to bargain in good faith.[234] If the NLRB decides to file a ULP charge, the parties to the case may create a "My Account Portal" in which they can view the case, e-file documents, and view the history of documents they have filed.[235] Again, this does not provide full access to all records submitted, but it does provide some basic access to information about the case.

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227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 29 U.S.C. §§ 151–169.

234 *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are [https://perma.cc/2Y-BE-LATL] (last visited June 6, 2026).

235 *MyNLRB*, NLRB, https://www.nlrb.gov/MyNLRB [https://perma.cc/6V2U-TC6T] (last visited May 10, 2026).

E. Proactive Disclosure

Proactive disclosure may not, at first blush, seem like a likely strategy for providing access related to individual proceedings; after all, privacy or confidentiality interests are likely at stake when considering records about a particular adjudication. Still, in some instances—albeit relatively limited ones—an entire proceeding is appropriately publicly docketed. In others, records that individuals may want to use in agency proceedings can be affirmatively disclosed in database form for all to access. Two such examples of the potential for proactive disclosure as a strategy for providing access emerged in the cases examined for this Article.

As to public docketing, licensing emerged as an area of potential full public docketing. Licensing is a unique type of administrative proceeding insofar as procedural requirements are enumerated at a higher degree of specificity in the APA.[236] In particular, licenses are specifically defined as an "order" following an adjudication for APA purposes, and section 558 requires those adjudications to be conducted according to many of the APA requirements for formal adjudication.[237] As a result, licensing proceedings, including at FERC, are docketed on a public docket,[238] and any oral or outside written communications pertaining to the licensing are recorded and publicly docketed.[239] As such, there is very little need for any party to a licensing proceeding—or even a nonparty who is concerned with the proposed project—to use other means to obtain disclosure of relevant records.[240]

As to affirmative disclosure, administrative discovery—or its stand-ins—does not solve the need for some kinds of agency records related to those proceedings: the corpus of past agency decisions that may be particularly relevant to parties' arguments for consistency, leniency, or otherwise advocating for their position. These records may be appropriately systematically disclosed through an affirmative disclosure database.

Many such examples emerged. For example, the EPA publishes a publicly available database of past enforcement actions.[241] During

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236 *See* 5 U.S.C. § 558(c) (requiring licensing proceedings to be conducted in accordance with sections 556 and 557, which include procedural protections such as burdens of proof, exclusivity of the record, and a ban on ex parte communications).

237 *See id.*

238 *See eLibrary*, FERC (Aug. 22, 2025), https://elibrary.ferc.gov/eLibrary/search [https://perma.cc/DQJ4-2CRN]; 18 C.F.R. § 388.102(b) (2025) (requiring a notice of proceedings for an application for a hydroelectric power project).

239 18 C.F.R. § 385.2201(f)(2), (g)(1)–(h)(3) (2025).

240 *See supra* text accompanying notes 172–77.

241 *Enforcement and Compliance History Online*, EPA, https://echo.epa.gov/ [https://perma.cc/E6TK-DL56] (last visited July 4, 2026).

negotiations over chemical statute violations, the EPA and the regulated entity both rely on the results of past enforcement actions as a sort of precedent-lite guidance on an appropriate remedy.[242] The ready availability of these documents facilitates regulated entities' abilities to best advance their positions in negotiations and in litigation.

Similarly, at USDA's Animal Care Unit, a database of inspection reports and enforcement actions is publicly available and provides substantial detail regarding the nature of the violations and penalties.[243] As a result, private parties have access to USDA's prior actions from which they may formulate arguments about appropriate penalties, and USDA, for its part, may draw on this wealth of data to show a pattern or history of violations or other relevant factors related to a particular proceeding.

CBP uses an analogous approach concerning enforcement of import duties on goods crossing into the United States.[244] Every importer of goods must have a specific code under the Harmonized Tariff Schedule of the United States ("HTSUS") that determines the duty rate for the type of good and country of origin associated with the import.[245] Although most importers apply the HTSUS guidelines to determine what code applies, when ambiguity arises, importers can seek a "ruling letter" which provides a binding decision concerning the tariff classification and duty owed in advance of importing goods.[246] Beginning in the early 2000s, CBP began publishing a comprehensive, searchable database of these rulings in an effort to provide importers with a way to look for rulings about similar goods and decide how their goods should be classified.[247] This database now contains rulings dating back to 1989.[248]

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242 *See* Off. of Enf't & Compliance Assurance, EPA, Enforcement and Compliance Assurance Annual Results for Fiscal Year 2024 (2024), https://www.epa.gov/system/files/documents/2025-03/eoy2024.pdf [https://perma.cc/H872-3SCB] ("EPA increased inspections and case conclusions to drive impactful, precedent-setting results . . . .").

243 *Welcome to the USDA Animal Care Public Search Tool*, Animal & Plant Health Inspection Serv., U.S. Dep't of Agric., https://aphis.my.site.com/PublicSearchTool/s/ [https://perma.cc/TN49-3BLF] (last visited May 10, 2026).

244 *See* Andrew Findlay, *Top U.S. Agencies Involved in Import Compliance (FDA, USDA, CBP)*, Clearit USA (June 16, 2025), https://clearitusa.com/top-u-s-agencies-involved-in-import-compliance-fda-usda-cbp/ [https://perma.cc/J2SN-TLB2].

245 Jacob Lee, *Harmonized System 101: An Importer's Guide to HS Codes*, USA Customs Clearance (July 17, 2025), https://usacustomsclearance.com/process/harmonized-system-hs-codes/ [https://perma.cc/44PW-QB5D].

246 *Rulings and Legal Decisions*, U.S. Customs & Border Prot. (Jan. 7, 2026), https://www.cbp.gov/trade/rulings [https://perma.cc/HZV6-5GU4]; *see What Are Ruling Letters?*, U.S. Customs & Border Prot. (May 6, 2024), https://www.cbp.gov/trade/rulings/ruling-letters [https://perma.cc/ZY9M-CB2M].

247 *About the Customs Rulings Online Search System (CROSS)*, U.S. Customs & Border Prot. (June 2, 2026, at 08:57 ET), https://rulings.cbp.gov/home [https://perma.cc/T7WC-H6MM].

248 *Id.*

Other importers can thus reference this database to decide what duties are applicable to their imports.

Finally, EOIR provides an example of a change in policy in this regard. Concerning immigration proceedings, the BIA issues a small number—around thirty per year—of precedential, published decisions that are available to the public.[249] Yet another 30,000 unpublished, nonprecedential decisions have been historically unavailable.[250] Although the BIA discourages citing those decisions,[251] the BIA itself will sometimes cite them, and the parties are not prohibited from citing them.[252] Because these unpublished decisions can be of great value to the parties, private attorneys historically relied on a single immigration lawyer who started a newsletter that collected unpublished BIA decisions and offered access to them for a fee.[253] In 2021, however, the Second Circuit allowed a lawsuit to proceed against the BIA for its failure to publish these decisions under FOIA's affirmative disclosure provisions.[254] On remand, the case settled, and the BIA agreed to make the decisions available affirmatively going forward, with some limited exceptions.[255] In January 2023, the BIA began posting those decisions in an online database available to the public.[256]

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249 *See* N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 210, 223–24 (2d Cir. 2021) (describing the utility of these unpublished decisions to the parties); *see also* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Admin. Conf. of the U.S., Precedential Decision Making in Agency Adjudication 33–34 (2022), https://www.acus.gov/sites/default/files/documents/Precedential%20Decision%20Making%20in%20Agency%20Adjudication%20-%20Final%20Report%202022.12.06_0.pdf [https://perma.cc/84VE-AEV2] (finding that the use of nonprecedential decisions is not uncommon across agencies); *cf.* Adoption of Recommendations, 88 Fed. Reg. 2312, 2313 (Jan. 13, 2023) (recommending public availability of precedential decisions).

250 *See N.Y. Legal Assistance Grp.*, 987 F.3d at 210.

251 *Appx G—Citations*, Exec. Off. for Immigr. Rev., DOJ, https://www.justice.gov/eoir/policy-manual-eoir/part-VII/appendices/g [https://perma.cc/2HQ5-PPB7] (last visited June 6, 2026) ("Citation to unpublished decisions is discouraged because these decisions are not binding on the immigration courts in other cases. When reference to an unpublished case is necessary, the citation should include . . . .").

252 *N.Y. Legal Assistance Grp.*, 987 F.3d at 211 n.7 (citing examples of instances when the government relied on unpublished decisions); Faiza W. Sayed, *The Immigration Shadow Docket*, 117 Nw. U. L. Rev. 893, 915 (2023) ("[Immigration judges] and attorneys representing the government have relied upon unpublished decisions to support their arguments.").

253 *See Unpublished BIA Decisions*, Immigrant & Refugee App. Ctr., https://www.irac.net/unpublished/ [https://perma.cc/R3SR-E3W2] (last visited May 10, 2026).

254 *See N.Y. Legal Assistance Grp.*, 987 F.3d at 225–26 (holding that FOIA's affirmative disclosure provisions were enforceable under FOIA's judicial review provision and remanding for further proceedings).

255 Stipulation of Settlement at 2, 4–7, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 401 F. Supp. 3d 445 (S.D.N.Y. Feb. 9, 2022) (No. 18-cv-09495).

256 *NYLAG v. Board of Immigration Appeals*, N.Y. Legal Assistance Grp., https://nylag.org/boia/ [https://perma.cc/3KQ9-2SJL] (last visited May 10, 2026); *see also Reading Room*, Exec. Off. for Immigr. Rev., DOJ, https://foia.eoir.justice.gov/app/ReadingRoom.aspx [https://perma.

F. FOIA Requests

Another way that agencies may provide access to records related to proceedings to those private parties who need them is through FOIA's request-and-response process. This use of FOIA is commonly referred to as first-party or first-person use of FOIA and often is deployed when the agency has not developed an alternative method for delivering the necessary information, either because such alternatives are not feasible or because the agency has not invested in alternatives. Still, FOIA is not only a strategy of last resort. Sometimes the population the agency serves prefers to use the FOIA process or the agency has invested in a service-oriented FOIA office as a strategy in and of itself. Although some businesses with proceedings before agencies use FOIA, FOIA is much more commonly used in proceedings concerning individuals.

Take, for example, CBP's immigration enforcement function.[257] In performing this function, CBP engages in a vast amount of decision-making at the ports of entry that are associated with very little process, including basic immigration inspection for individuals who present themselves at ports of entry.[258] To make determinations about the admissibility of any given individual at the border, the CBP agent will use the documentation provided by the individual as well as information contained in a database called the Interagency Border Inspection System, which houses information from a wide variety of law enforcement agencies.[259] CBP may immediately return some inadmissible individuals to their country of origin without a hearing under a process called Expedited Removal, although other individuals, such as lawful permanent residents or asylum seekers, are entitled to a hearing before an immigration judge.[260] CBP also may decide to temporarily detain someone pending further proceedings or expedited removal, but for any long-term immigration detention, CBP would transfer the detainee to U.S. Immigration and Customs Enforcement ("ICE").[261]

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cc/HG4E-6XZ7] (last visited May 10, 2026) (providing access to those previously unpublished decisions).

257 *About CBP*, U.S. Customs & Border Prot. (Dec. 18, 2025), https://www.cbp.gov/about [https://perma.cc/7832-C9NN].

258 *See Immigration Inspection Program*, U.S. Customs & Border Prot. (May. 6, 2026), https://www.cbp.gov/border-security/ports-entry/overview [https://perma.cc/H3KJ-Q6EX].

259 *CBP Search Authority*, U.S. Customs & Border Prot. (Jan. 28, 2026), https://www.cbp.gov/travel/cbp-search-authority [https://perma.cc/HRU8-A9EF].

260 *6.4—Limited Proceedings*, Exec. Off. for Immigr. Rev., DOJ, https://www.justice.gov/eoir/policy-manual-eoir/part-II/icpm/chapter-6-4 [https://perma.cc/BC9L-BYLN] (last visited June 6, 2026).

261 U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec., Short-Term Detention Standards and Oversight: Fiscal Year 2015 Report to Congress ii (2015), https://www.dhs.gov/sites/default/files/publications/CBP%20-%20Short-Term%20Detention%20Standards%20and%20Oversight.pdf [https://perma.cc/L6ZN-D7P8].

As a result, the proceedings at CBP themselves are not subject to the kinds of procedural protections associated with discovery or information gathering by the affected individual. Instead, the records that CBP creates, including the history of entering or leaving the country, any order of expedited removal, any notes from any interview conducted by a border agent or at the border, will be needed, if at all, for further proceedings that may occur at U.S. Citizenship and Immigration Services ("USCIS")—if the noncitizen is seeking an immigration benefit—or at ICE—if the noncitizen is subject to removal proceedings.[262] Information about encounters with border officials, short-term detentions, or a complete history of valid entry and exit data for an individual will not be located in an A-File—the permanent immigration record for each noncitizen housed at USCIS—but instead will be available only through CBP.[263]

FOIA is the primary way that individuals obtain these records that they need for proceedings before USCIS or ICE.[264] For some entry and exit data, CBP has created portal access to those records, the I-94 portal.[265] But this database typically only goes back ten years, and its contents are not considered official records that can be used in further proceedings.[266] Yet entry and exit data held by CBP goes back as far as 1982,[267] and noncitizens often need these records in official form; thus, many individuals still turn to FOIA for this basic information, even if portal access has cut down on the need for some portion of FOIA requests as to these records.

Concerning individuals crossing the border, CBP is not only an enforcement agency but also, to some extent, a benefits agency. It administers the Trusted Traveler Programs, such as PreCheck and Global Entry, and in so doing processes applications and issues decisions about acceptance into the programs.[268] To qualify, an applicant

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262 Margaret B. Kwoka, Obtaining Government Records for Use in Agency Proceedings 24 (2025), https://www.acus.gov/sites/default/files/documents/Obtaining%20Government%20Records%20Final%20Report%20-%20Formatted%20%281%29.pdf [https://perma.cc/Q5ND-FMK8].

263 *See Request Records Through the Freedom of Information Act*, U.S. Customs & Border Prot. (Oct. 4, 2024), https://www.cbp.gov/site-policy-notices/foia/records [https://perma.cc/3B-WB-QDSZ] (listing these kinds of records as available from CBP, not sister components of DHS).

264 *See* Homeland Sec. Sys. Eng'g & Dev. Inst., Final DHS First-Party FOIA Feasibility Assessment 48–49 (2024), https://www.dhs.gov/sites/default/files/2025-03/0320_25_PRIV-Final-DHS-FOIA-Feasibility-Assessment-Report.pdf [http://perma.cc/NM6D-4XQS] (documenting that traveler records constituted eighty-five percent of CBP's 144,000 FOIA requests in fiscal year 2023).

265 *Official Site for Travelers Visiting the United States*, U.S. Customs & Border Prot., https://i94.cbp.dhs.gov/home [https://perma.cc/Q76F-2M3V] (last visited June 6, 2026).

266 *Id.*

267 *See Request Records Through the Freedom of Information Act*, *supra* note 263.

268 *See supra* note 107 and accompanying text.

must demonstrate, among other things, an eligible citizenship or visa status and that they do not have any criminal, customs, or immigration violation history.[269] When CBP denies an application, however, the decisional document provided to the applicant sometimes provides little to no reasoning supporting the denial.[270]

Denied applicants have the option to seek reconsideration of a denial through CBP's ombudsman office, which receives around 20,000 such reconsideration requests per year.[271] The instructions given to denied applicants concerning their rights have changed over time. Prior to 2018, CBP directed individuals to contact their local Enrollment Center and speak to a supervisor for further information about a denial, and this communication included contact information.[272] Around 2018, however, the letters stopped specifying how to get further information,[273] even though it was required by regulation,[274] and this may have contributed to the rise in FOIA requests for denial-related records. As a result, CBP receives some 7,000 FOIA requests a year seeking information about the government's basis for the denial.[275] These files are relatively complex to process under FOIA, often containing significant law enforcement information that is subject to an exemption and accompanying redaction.[276] CBP has asserted that it will return to its previous instructions about how to seek additional information about denials.[277]

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269 *Eligibility for Global Entry*, U.S. Customs & Border Prot. (Jan. 13, 2026), https://www.cbp.gov/travel/trusted-traveler-programs/global-entry/eligibility [https://perma.cc/6X95-5M7N].

270 *See* 8 C.F.R. § 235.12(j) (2025) (lacking a requirement for detailed explanations); U.S. Gov't Accountability Off., *supra* note 42, at 26–27, 27 n.41 ("[The CBP denial letters] may not provide specific information about the reason for denial or revocation . . . . For example, [they] may simply cite 'criminality' or 'incomplete or inaccurate information' in travelers' program application, without any additional information on the specific disqualifying criminal offense or inaccurate application information," and "[they] may also cite 'other' or 'you do not meet program eligibility requirements' as a reason . . . which may indicate CBP is not permitted [to] or has chosen not to disclose the specific reason . . . within the letter.").

271 *Trusted Traveler Program Denials*, U.S. Customs & Border Prot. (Mar. 6, 2024), https://www.cbp.gov/travel/trusted-traveler-programs/program-denials [https://perma.cc/JS4W-WDUF]; U.S. Gov't Accountability Off., *supra* note 42, at 25–26 (citing 76,183 reconsideration requests from fiscal year 2020 to fiscal year 2023, of which the Ombudsman sustained sixty-one percent and reversed thirty-nine percent).

272 U.S. Gov't Accountability Off., *supra* note 42, at 27.

273 *Id.*

274 *See, e.g.*, 8 C.F.R. § 235.12(j)(1) (2025) (Global Entry); 8 C.F.R. § 235.13(f)(1) (2025) (U.S. Asia-Pacific Economic Cooperation Business Travel Card); 8 C.F.R. § 235.14(f)(1) (2025) (Secure Electronic Network for Travelers Rapid Inspection).

275 *See* Homeland Sec. Sys. Eng'g & Dev. Inst., *supra* note 264, at 67; U.S. Gov't Accountability Off., *supra* note 42, at 26–27, 29.

276 Homeland Sec. Sys. Eng'g & Dev. Inst., *supra* note 264, at 49.

277 U.S. Gov't Accountability Off., *supra* note 42, at 25–27.

Other kinds of enforcement functions similarly give rise to first-person FOIA requesting. At ED, the Office of Civil Rights ("OCR") is responsible for handling complaints about civil rights violations by educational institutions, such as disability, race, and sex discrimination.[278] During the investigation process, the complainant and responding institution are asked to provide information to the enforcement office, and OCR acts as a neutral factfinder toward a variety of resolutions.[279] Although the fact of pending resolutions is disclosed and eventual investigation resolutions are published, the parties themselves often use FOIA in lieu of discovery to uncover what information OCR has gathered about the complaint.[280] In fiscal year 2024, OCR responded to 1,236 FOIA requests and reduced its FOIA backlog by 37.4 percent overall.[281] OCR had reduced its FOIA backlog by thirty-seven percent in the previous year as well after processing 1,276 FOIA requests in fiscal year 2023.[282] The number showed a significant increase from fiscal year 2022, when OCR responded to 826 FOIA requests.[283]

Even at the IRS, where the taxpayer typically has the relevant information in their possession, some first-person FOIA requesting practices emerged. For example, the IRS has to follow certain legal processes to impose a penalty, including approval by a supervisor at a

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278 *Civil Rights Laws*, U.S. Dep't of Educ., https://www.ed.gov/laws-and-policy/civil-rights-laws/civil-rights-faqs [https://perma.cc/93PW-VD5X] (last visited May 10, 2026); *About OCR*, U.S. Dep't of Educ. (Apr. 11, 2025), https://www.ed.gov/about/ed-offices/ocr/about-ocr [https://perma.cc/5BTN-97XE].

279 *Questions and Answers on OCR's Complaint Process*, U.S. Dep't of Educ. (Aug. 26, 2025), https://www.ed.gov/laws-and-policy/civil-rights-laws/civil-rights-faqs/questions-and-answers-on-ocrs-complaint-process [https://perma.cc/MB7M-BMFZ]; *see also* 34 C.F.R. § 100.7 (2024) (describing the investigation process); *How the Office for Civil Rights Handles Complaints*, U.S. Dep't of Educ. (Apr. 28, 2025), https://www.ed.gov/laws-and-policy/civil-rights-laws/file-complaint/how-the-office-for-civil-rights-handles-complaints [https://perma.cc/XK6K-948V].

280 *See How the Office for Civil Rights Handles Complaints*, *supra* note 279 (stating that complainant and recipient receive notice and that OCR, generally, must respond to FOIA requests); *OCR Advanced Search*, U.S. Dep't of Educ., https://ocrcas.ed.gov/ocr-advanced-search [https://perma.cc/FJW5-ZGQD] (last visited May 10, 2026) (demonstrating publication of resolution documents).

281 Off. for C.R., U.S. Dep't of Educ., 2024 Fiscal Year Annual Report: Report to the President and Secretary of Education 8 (2024), https://www.ed.gov/media/document/ocr-report-president-and-secretary-of-education-2024-109012.pdf [https://perma.cc/K2JC-EX62].

282 Off. for C.R., U.S. Dep't of Educ., Fiscal Year 2023 Annual Report: Report to the President and Secretary of Education 9–10 (2023), https://www.ed.gov/sites/ed/files/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2023.pdf [https://perma.cc/D7KB-ZAP5].

283 Off. for C.R., U.S. Dep't of Educ., *supra* note 281–82; Off. for C.R., U.S. Dep't of Educ., Fiscal Year 2022 Annual Report: Report to the President and Secretary of Education 9 (2022), https://www.ed.gov/sites/ed/files/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2022.pdf [https://perma.cc/9SJV-XNYC].

certain stage and mailing notices by a certain deadline.[284] The taxpayer may want records related to the IRS procedures used in order to verify that legal requirements were met or to challenge the penalty assessed on the basis that they were not met.[285] Or occasionally, an IRS notice will state a determination and then offer a set of justifications that are very general, and perhaps the taxpayer may want to clarify the basis for the determination.[286] These are instances that give rise to first-person uses of FOIA.

Some enforcement actions against companies, rather than individuals, do give rise to FOIA requests as well, albeit in significantly smaller volumes. CBP, for example, brings enforcement actions concerning violations of trade laws, including tariff or country-of-origin violations concerning the abovementioned requirements,[287] as well as some intellectual property and antitrust violations.[288] When CBP believes that trade laws have been violated, CBP can seize goods at the border or assess penalties, and the affected party then has a right to petition for relief to challenge the finding of violation or explain mitigating information.[289] The petition process proceeds through a portal through which a decision on the petition is also rendered.[290] Still, parties who want more information about CBP's assessment of a penalty, including information about what tip or other reason provoked the investigation, can file a FOIA request for records.[291] CBP may withhold some for law enforcement reasons, but parties will often be given extra time to challenge a penalty on the basis of waiting for the response to their FOIA

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284 *See, e.g.*, 26 U.S.C. § 6751(b)(1) (requiring supervisory approval prior to imposing a penalty).

285 Margaret B. Kwoka, Saving the Freedom of Information Act 94 (2021).

286 *See id.* (describing the various types of investigative records requesters may seek from the IRS).

287 *See supra* note 245 and accompanying text.

288 *Intellectual Property Rights (IPR)*, U.S. Customs & Border Prot. (Aug. 25, 2025), https://www.cbp.gov/trade/priority-issues/ipr [https://perma.cc/34Z4-U8JF]; *Priority Trade Issue: Antidumping and Countervailing Duties*, U.S. Customs & Border Prot. (Dec. 4, 2025), https://www.cbp.gov/trade/priority-issues/adcvd [https://perma.cc/LA9U-AKHB].

289 *Welcome to the ePetition Application!*, U.S. Customs & Border Prot., https://epet.cbp.dhs.gov/main [https://perma.cc/7ALL-5XXT] (last visited June 6, 2026).

290 *DHS/CBP/PIA-040 Seized Assets and Case Tracking System*, U.S. Dep't of Homeland Sec., https://www.dhs.gov/publication/dhscbppia-040-seized-assets-and-case-tracking-system [https://perma.cc/G92H-MESB] (last visited July 21, 2026).

291 *Filing a FOIA Request with CBP*, Auth. Network Am., https://cbpauthority.com/cbp-foia-requests/ [https://perma.cc/7JPL-GNG5] (last visited July 21, 2026) ("Businesses involved in customs disputes may request records related to seizures, penalty notices, or CBP trade enforcement actions."); *cf. E-Allegations Program*, U.S. Customs & Border Prot. (July 13, 2026), https://www.cbp.gov/trade/programs-administration/e-allegations [https://perma.cc/JT6S-JHCZ] (online portal for submitting allegations of commercial trade violations).

request.[292] Parties use FOIA because there is no discovery right associated with these proceedings.[293]

Finally, a group of agencies has chosen deliberately to use FOIA to best serve their private party populations. These agencies demonstrate that FOIA can be a strategy, rather than a default. The EEOC, for example, provides portal access for basic documents, but the so-called "charge file"—which is the full investigative file of the EEOC pertaining to a particular charge—will contain more documents than are available on the portal.[294] In particular, it will contain other documents that the investigator has obtained during the investigation, such as the investigator's notes and documentation of witness interviews.[295] During the course of the investigation, the parties do not have access to these records because the investigation is pending.[296] Once the investigation is complete, however, and the charging party has received a notice of a right to sue, the charging party has ninety days to file a lawsuit in federal court.[297] During that same ninety-day period, they may file a FOIA request for their charge file.[298] These requests constitute the vast majority of all FOIA requests at the EEOC. In fiscal year 2023, the EEOC's FOIA logs reported a total of 15,590 requests, of which 14,657—or ninety-four percent—were described as requests for charge files.[299] No one other than the charging party is entitled to the file unless and until the charging party brings a lawsuit in federal court, at which point the respondent is entitled to request it as well.[300]

PBGC provides another such example. This Agency protects participants in private sector defined benefit retirement plans by taking over private pension plans that terminate without sufficient assets to pay all benefits; it then manages and pays out the benefits, subject to

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292 *See* 19 C.F.R. § 171.2(c) (2025) (giving an officer the discretion to grant an extension).

293 *See* 19 C.F.R. § 171 (2025) (describing a petition-driven review process without any discovery provisions).

294 *See* Kwoka, *supra* note 15, at 2238 (describing the contents of a charge file).

295 *See Questions and Answers: FOIA Requests for Charge Files*, EEOC, https://www.eeoc.gov/foia/questions-and-answers-foia-requests-charge-files [https://perma.cc/VF4Q-YZE2] (last visited May 10, 2026).

296 *See* 5 U.S.C. § 552(b)(7)(A), (E).

297 42 U.S.C. § 2000e-5(f)(1), (3).

298 *See Freedom of Information Act*, EEOC, https://www.eeoc.gov/foia [https://perma.cc/WH4S-Y8NJ] (last visited May 10, 2026). These are FOIA, not Privacy Act, requests because under 5 U.S.C. § 552a(k)(2), the EEOC exempts several systems of records—including charge files related to discrimination claims and internal harassment inquiries—from certain provisions of the Privacy Act, including § 552a(d), which governs access to records. 29 C.F.R. § 1611.13 (2024).

299 *2023 FOIA Log*, EEOC, https://www.eeoc.gov/sites/default/files/2024-03/2023%20FOIA%20Log.xlsx [https://perma.cc/4DMH-CSPQ] (last visited May 10, 2026).

300 *Freedom of Information Act*, *supra* note 298; *see also* 29 C.F.R. § 1610.5(b)(3) (2024) (requiring the respondent to "provide a copy of the 'Filed' stamped court complaint when requesting a copy of a charge file").

limitations.[301] As such, PBGC effectively administers retirement benefits for a large number of workers and retirees.[302] At times, PBGC needs information held by other agencies. For example, if a person comes forward saying they were a plan participant but had not been identified as such—called a missing participant—they would have to demonstrate that they worked for the employer during the applicable time period through tax returns or Social Security information.[303] In those instances, though, PBGC does not obtain the information directly from another agency; rather, it assists the beneficiary in tracking down records, including through FOIA, directly from the other agencies.[304]

In addition, PBGC uses FOIA to provide access to its own records in some circumstances. When PBGC takes over a plan, it issues a benefit determination letter, which explains the benefits that PBGC will pay to each plan participant—a determination that the participant has a right to appeal.[305] PBGC directs those appellants who want copies of PBGC records to file a FOIA request and specifies that any appeal filed should list any information requests for which a response has not yet been received—whether from PBGC, another federal agency, or a private party.[306] If the individual is awaiting a response from a PBGC FOIA office, the appeal will typically be stayed.[307] Even though the benefit file is often releasable in full to the beneficiary, it still needs to be reviewed because third-party information may have made its way into the file from the prior plan administrator.[308]

Finally, the Veterans Health Administration ("VHA") has historically been the recipient of the highest volume of FOIA requests at the

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301 *How We Operate*, Pension Benefit Guar. Corp. (Jan. 27, 2026), https://www.pbgc.gov/about/operate [https://perma.cc/6HU2-UMPJ].

302 *Id.* (noting that PBGC manages retirement benefits of around thirty million people).

303 *See Missing Participants Program for PBGC-Insured Single-Employer Plans*, Pension Benefit Guar. Corp. (Feb. 9, 2026), https://www.pbgc.gov/employers-practitioners/missing-participants-program/single-employer [https://perma.cc/U2C5-394J]; Pension Benefit Guar. Corp., Missing Participants Program Filing Instructions 10, 14 (2025), https://www.pbgc.gov/sites/default/files/form-mp100-instructions.pdf [https://perma.cc/2ALM-TYTU].

304 *See* 29 C.F.R. § 4003.3 (2025) (providing that a person can request PBGC's assistance in obtaining the necessary information for filing a request for review of an initial determination or administrative appeal).

305 *Appeal Your PBGC Benefit Determination*, Pension Benefit Guar. Corp. (Aug. 14, 2025), https://www.pbgc.gov/workers-retirees/manage/appeal-benefit-determination [https://perma.cc/LMF8-WTRM].

306 Pension Benefit Guar. Corp., Pub. PBGC PS-02, Your Right to Appeal (2024), https://www.pbgc.gov/sites/default/files/legacy/docs/yourrighttoappeal.pdf [https://perma.cc/KFF4-E252].

307 *Cf. Your Right to Appeal*, Pension Benefit Guar. Corp. (May 27, 2025), https://www.pbgc.gov/workers-retirees/manage/appeal-benefit-determination/your-right [https://perma.cc/4QTB-4J87] (describing the process for requesting a stay).

308 Pension Benefit Guar. Corp., 2010: Chief FOIA Officer Report from the Pension Benefit Guaranty Corporation 2 (2010), https://www.pbgc.gov/documents/chieffoiaofficer2010.pdf [https://perma.cc/923R-UBD8].

VA, largely from individuals looking for their own medical records.[309] It appears this may be because digitization efforts have not reached more historical records, and among veterans, FOIA is known to work quickly and effectively and, as such, is an option people know to turn to.[310]

In 2024, though, requests for records from the Veterans Benefits Administration ("VBA") went up by some fifteenfold, surpassing VHA requests by a good measure.[311] The reason for this massive increase appears to be related to the Honoring Our PACT Act,[312] which expanded VA health care and benefits for veterans exposed to chemicals from burn pits, giving presumptive access to those benefits where they were previously believed ineligible.[313] Still, the VBA has managed to handle the incredible volume of requests expeditiously.[314] Most of the requests appear to be for records about a veteran's own service that they want to use to show eligibility, simply because VBA may have maintained the service records.[315] FOIA, again, is well known in the veteran community and may act as a default culturally for obtaining records and applying for benefits.

G. Non-FOIA Request Processes

The final method for providing access to government records for use in agency proceedings that surfaced in the agencies studied for this Article is the creation of a specialized, non-FOIA request process at a given agency for particular records. These types of procedures have been tried at a few agencies with mixed results. The question these procedures raise is whether they provide a service distinct from or somehow better than what FOIA already does.

For example, at the EEOC—where FOIA is relied on heavily—the Agency also offers a separate access process through what is known as a section 83 request, named after the portion of the EEOC compliance

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309 *See* U.S. Dep't of Veterans Affs., FY2018 Annual Report 5 (2018), https://va.secureocp.com/app/ReadingRoom.aspx [https://perma.cc/X7LG-KE2P].

310 *See, e.g.*, U.S. Dep't of Veterans Affs., FOIA Annual Report for 10/01/2023 Through 09/30/2024, at 35–37 tbl. VII.B (2025), https://department.va.gov/foia/wp-content/uploads/sites/6/2025/03/FY2024_Annual_Report_508.pdf [https://perma.cc/4B59-SS8K] (showing VHA's average processing time to be less than sixteen days and the median processing time to be eight days).

311 *See id.* at 14; U.S. Dep't of Veterans Affs., *supra* note 309, at 5.

312 Honoring Our PACT Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (codified in scattered sections of 38 U.S.C.).

313 *See The PACT Act and Your VA Benefits*, U.S. Dep't of Veterans Affs. (June 2, 2026), https://www.va.gov/resources/the-pact-act-and-your-va-benefits/ [https://perma.cc/Z7DP-W6VG].

314 *See, e.g.*, U.S. Dep't of Veterans Affs., *supra* note 310, at 35–37 tbl. VII.B (showing VHA's average processing time to be less than fifty days and the median processing time to be one day).

315 *See* U.S. Dep't of Veterans Affs., *supra* note 310, at 13–14 tbl. V.A.

manual in which the process is laid out.[316] In theory, the EEOC processes this request much more quickly because redactions are simply discretionary and not pursuant to FOIA exemptions. There is also no process for appealing any denial or withholding under section 83, and so parties may file FOIA requests afterward if they want additional information.[317] Now, however, FOIA operations are efficiently handling their workload, and section 83 is rarely utilized.[318]

By contrast, at FERC, a non-FOIA process serves a separate set of interests evidently well. At that Agency, the actions of large energy companies have direct effects on consumers, communities, and the environment, interests that often result in intervenors to proceedings or third parties with direct stakes in the proceedings who want access to information about them. As to these interests, one particular concern at FERC is what is known as critical electric infrastructure information ("CEII"), which is exempted from FOIA disclosure by section 215(d) of the Federal Power Act,[319] and concerns specific engineering and design information about proposed or existing infrastructure.[320] Rather than using FOIA, FERC has a separate process for obtaining CEII that involves demonstrating a need for the information and signing a non-disclosure agreement as to the information.[321] Market research firms, consultants, or intervenors or participants in a proceeding typically meet the demonstrated need standard.[322] FERC's CEII Coordinators handle these CEII requests separately from the FOIA office, and these requests are not counted as FOIA requests.[323] This process for requesting CEII is frequently utilized, on par with the use of FOIA.[324] The particular nature of the information and expertise required to handle it appears to justify a separate process.

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316 *See Section 83 Disclosure of Information in Charge Files*, EEOC, https://www.eeoc.gov/section-83-disclosure-information-charge-files [https://perma.cc/324L-H2TP] (last visited June 6, 2026).

317 *See id.* (providing no such process and noting that section 83 "provides for a less formal, less structured, and more flexible method of disclosure").

318 *See Fiscal Year 2025 Chief FOIA Officer Report*, EEOC, https://www.eeoc.gov/fiscal-year-2025-chief-foia-officer-report [https://perma.cc/QHN2-BZHU] (last visited May 10, 2026).

319 16 U.S.C. § 824o-1(d)(1).

320 *Id.*

321 *Critical Energy/Electric Infrastructure Information (CEII)*, FERC (May 28, 2026), https://www.ferc.gov/ceii#Forms [https://perma.cc/AY6G-U2UB]; 18 C.F.R. § 388.113(g)(5) (2025).

322 *Cf. Critical Energy/Electric Infrastructure Information (CEII)*, *supra* note 321 (describing the criteria for demonstrating need).

323 *Critical Energy/Electric Infrastructure Information (CEII)*, *supra* note 321; *see* 18 C.F.R. § 388.113(c)(1) (2025).

324 *See* Regulations Implementing FAST Act Section 61003—Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information, 81 Fed. Reg. 43,557, 43,557–58 (July 5, 2016); FERC, Annual Freedom of Information Act Report Fiscal Year 2024, at 17 tbl. XII.D.(1) (2026), https://www.ferc.gov/media/2025-annual-report [https://perma.cc/VE9F-CFWA].

Similarly, when veterans apply for healthcare benefits through the VA, the applicant must provide some federal records, including discharge papers.[325] Oftentimes, applicants need to request those records from the National Archives Personnel Records Center, which has a request process that is handled extremely expeditiously outside of FOIA for those records.[326]

A fourth example remains unclear as to its effects. At EOIR, some individuals need access to records from a past immigration case that they had before the Agency, not available through the portal for current cases.[327] For those individuals, EOIR has created a separate process to request their own Record of Proceeding ("ROP"), and these requests are processed directly by the immigration court or the BIA where the record is held, rather than the FOIA office.[328] Yet EOIR FOIA request numbers have not diminished measurably since this initiative took hold,[329] despite the fact that the ROP process seemingly should have removed huge swaths of first-person requests from FOIA. It may be that EOIR is counting ROP requests as FOIA requests, or that more time is needed to see the effects of the shift.[330]

III. Toward Procedural Justice in Records Practices

The preceding Part set out a framework of agency strategies for gathering and providing access to federal records needed for use in agency proceedings. This framework and its component agency case studies reveal that each option is more feasible in some contexts than others.[331] For example, prepopulated data or information sharing from other agencies pose the fewest problems for private parties when used

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325 *How to Apply for VA Health Care*, U.S. Dep't of Veterans Affs. (July 11, 2024), https://www.va.gov/health-care/how-to-apply/ [https://perma.cc/GA4B-XPKA].

326 *Request Your Military Service Records (Including DD214)*, U.S. Dep't of Veterans Affs. (Jan. 13, 2026), https://www.va.gov/records/get-military-service-records/ [https://perma.cc/6RHC-4DW5].

327 *Cf. Request a Record of Proceeding (ROP)*, Exec. Off. for Immigr. Rev., DOJ (Aug. 27, 2025), https://www.justice.gov/eoir/ROPrequest [https://perma.cc/WJL5-NT8Q] (creating a separate process for requesting these records).

328 *Id.*

329 *Compare* DOJ, United States Department of Justice Annual Freedom of Information Act Report: Fiscal Year 2022 (2022), https://www.justice.gov/oip/media/1387291/dl?inline [https://perma.cc/Y2Q5-U3MW] (showing how many FOIA requests EOIR received in fiscal year 2022), *with* DOJ, Chief FOIA Officer's Report for March 2024 to March 2025, at 1 (2025), https://www.justice.gov/oip/media/1393581/dl?inline [https://perma.cc/PY6T-JH26] (showing how many FOIA requests EOIR received in fiscal year 2025).

330 *See* Sam Hsieh, Cap. Area Immigrants' Rts. Coal., Practice Advisory Requesting ROPs and DARs from EOIR 1 (2023), https://amicacenter.org/app/uploads/2024/05/EOIR-Records-Access-Practice-Advisory.pdf.pdf [https://perma.cc/4XWD-V83S] (indicating that the Executive Office for Immigration Review changed its policy for requesting records of proceedings in 2022).

331 *See* discussion *supra* Part II.

to aid individuals seeking benefits; greater concerns about fairness, accuracy, and notice arise when information sharing leads to punitive enforcement measures. In another arena, administrative discovery is an option that is available or should be considered a benchmark against which to measure access rights, but generally only in those instances where an agency is already conducting an evidentiary hearing. Frontline decisions made on paper records are not conducive to discovery mechanisms. Proactive disclosure, for its part, comes into play with particularly great effect in instances where members of the public need access to a corpus of prior agency decisions, akin to precedent, for use in their advocacy efforts.[332] And portal access is most efficient for agencies when records contained therein do not require individual review for redaction purposes, but rather contain entirely releasable documents such as those that the private party submitted to the agency themselves.[333] Indeed, many agencies employ multiple of these methods, sometimes concerning the very same type of proceeding.

Yet too often agency considerations in designing records gathering and access procedures focus on the agency's point of view.[334] This Part seeks to center the private parties who interact with agencies, utilizing the lens of their experience to set out the considerations that agencies should use to ensure their adjudication programs maximize procedural justice in records practices.

A. Weighing Agency Burden

The first consideration that agencies should weigh when making procedural design choices is how to use their own resources. To be sure, agencies are already doing this to a great degree. In many ways, examples demonstrate that they are overweighing this consideration. Still, it is worth unpacking how agencies can make the best use of their limited resources.

To begin, agencies should be more willing to take on the burden of gathering all federal records on behalf of private parties who may be less capable of self-advocacy, whether because of age, disability, education, sophistication, or some other reason. This goal is laudable and supported by literature on administrative burden on the public and the costs that such burdens may impose.[335] Some agencies studied in this Article are performing exactly this calculation. For example, at the SSA, although the regulations acknowledge the claimants' responsibility to

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332 *See* discussion *supra* Section II.E.

333 *See* discussion *supra* Section II.D.

334 *See, e.g.*, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 987 F.3d 207, 211 nn.7–8 (2d Cir. 2021) (describing examples of an agency preferring its own perspective).

335 *See supra* Section I.A.

take ownership of their cases and submit evidence,[336] as a practical matter, the Agency goes above and beyond in gathering evidence from any source that it can, including from private medical providers across the country. The SSA repeatedly sends forms asking for any updated medical information and allows the claimant to supplement their record up to and after the initial appeal.[337] There is no doubt that this level of service to beneficiaries is extremely beneficiary friendly.

Still, weighing resources is not one-sided. The SSA experiences persistent delays in adjudications, and the high bureaucratic costs lead one to wonder if the special solicitude for applicants may be slowing down the processing of benefits system-wide.[338] That, of course, may lead to delays for benefits for other deserving applicants, a type of cost in and of itself. Such solicitude may still be well worth it to unrepresented parties, but in a system where two-thirds of applicants are represented,[339] the costs of repeatedly searching for new records may be better placed at least in part on the applicant.

Another area where agencies can reduce burden on the public is through information sharing between agencies. This practice among federal agencies is particularly helpful to the public when used to facilitate the provision of benefits to those who qualify, with their consent. But downsides and risks certainly exist. For example, if agencies share inaccurate information in a way not visible to the private party to the proceedings, there may be little practical opportunity to correct the record. The FAFSA rollout, under which data was not correctly imported as promised in a timely way, may have cost applicants real opportunities in seeking higher education as well as undermined trust in ED in future interactions.[340] Although that program is now running smoothly, the experience highlights the need for careful attention to implementation.

In general, agencies should be willing to take on administrative burden rather than externalize those costs by offloading administrative

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336 20 C.F.R. § 404.1512 (2024). The VA has a similar duty to assist benefits applicants. *VA's Duty to Assist*, U.S. Dep't of Veterans Affs. (July 31, 2025), https://www.va.gov/resources/vas-duty-to-assist/ [https://perma.cc/CB2T-JRDB].

337 *See* sources cited *supra* note 336.

338 *See* Sharon Jayson, *Why Social Security Disability Claims Are Taking So Long*, AARP (June 12, 2024), https://www.aarp.org/social-security/disability-claim-wait-times/ [https://perma.cc/YKN3-6ML6].

339 *See Annual Data for Representation at Social Security Hearings*, Soc. Sec. Admin. (May 23, 2018), https://www.ssa.gov/data/representation-at-ssa-hearings.html [https://perma.cc/G8G7-LVLR] (showing data through 2015, at which point seventy percent of claimants had representations in hearings).

340 U.S. Gov't Accountability Off., GAO-24-107407, FAFSA: Education Needs to Improve Communications and Support Around the Free Application for Federal Student Aid 6 (2024), https://www.gao.gov/assets/gao-24-107407.pdf [https://perma.cc/AW49-C9MJ] (finding that the FAFSA rollout difficulties caused a nine percent drop in first-time applicants).

tasks to private parties, third-party representatives, or industries that fill in the void when members of the public lack the necessary know-how to navigate the process on their own. Easing administrative processes is a policy choice that agencies can make to better achieve the aims of their programs.[341]

B. Respecting Privacy and Consent

In all areas where an agency gathers records on behalf of an individual, the agency must consider the implications for the private party's privacy and autonomy. Most often, these concerns can be alleviated by designing programs that are based on the private party's consent to the agency gathering their records on their behalf. Consent is particularly important because when members of the public provide information about themselves to a federal agency for one purpose, they are often not imagining it will be used for another.[342] This can lead to distrust and perhaps harmful privacy breaches.

For the benefits programs included in this Article, programs that share information between agencies are typically based on consent. This is as true for the prefilled FAFSA form as it is for the SSA and VA records-gathering practices on behalf of benefits applicants.[343] In some instances, where agencies do not first seek consent, Matching Act agreements govern the information-sharing programs, the requirements for which provide some level of protection against misuse and inaccuracy of shared information.[344]

In particular, information sharing that leads to enforcement action—rather than assisting applicants for benefits—should be undertaken very cautiously. The increasing outrage over the IRS's sharing of information with ICE officials for immigration enforcement purposes serves as a prime example.[345] If individuals believe that any information

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341 To be sure, sometimes administrative hearings are nonadversarial and instead are inquisitorial, which itself is a policy choice that shifts the burden of information gathering onto the agency adjudicator rather than the member of the public. *See, e.g.*, 20 C.F.R. § 404.900(b) (2025) (detailing SSA proceedings as nonadversarial); Sims v. Apfel, 530 U.S. 103, 104 (2000); Richardson v. Perales, 402 U.S. 389, 400–01 (1971). Agencies can make this choice voluntarily, or Congress can do so in its statutory authorization of the adjudication program. Moreover, Congress has a role to play in requiring agencies to assume more administrative burden where appropriate, and Congress should be weighing these same considerations.

342 *See* 5 U.S.C. § 552a(b) (prohibiting agencies from disclosing records without consent).

343 *Supra* text accompanying notes 146–47; *see Privacy Program: A Central Source for Information about SSA's Privacy Compliance Program*, *supra* note 178; *Privacy Act Requests*, U.S. Dep't of Veterans Affs., https://department.va.gov/privacy/privacy-act-requests [https://perma.cc/C2DB-NC8P] (last visited May 10, 2026).

344 *See supra* Section I.B.

345 *See, e.g.*, Rene Marsh, *IRS Begins Sharing Sensitive Taxpayer Data with Immigration Authorities to Find Undocumented Migrants*, CNN Politics (Aug. 8, 2025), https://www.cnn.

that they provide to the government might be used for any purpose at any other agency, they may stop sharing information to the detriment of a well-functioning program.

Still, not all enforcement-related information sharing between agencies risks the integrity of the program or the trust of the public. For example, when agencies with overlapping regulatory jurisdiction perform inspections, they often will refer matters of concern to other agencies when they see the problem in the course of their own work.[346] This sort of information sharing based on information gleaned as part of routine regulatory enforcement efforts occurs in a context in which a regulated entity is typically well aware that they are subject to various oversight authorities and that the regulatory programs act in concert in many ways.[347] For example, if OSHA conducts a safety inspection at a workplace and sees evidence of labor law violations, referring the matter to the NLRB poses no great injustice to the company nor as a deterrent to any kind of voluntary engagement with the government.

Overall, agencies should promote information sharing where it can alleviate administrative burden on private parties who seek to obtain government benefits or to avail themselves of government programs. Agencies should exercise caution when sharing information concerning enforcement proceedings, particularly concerning private individuals and information that they voluntarily provided to the government for other purposes.

C. Avoiding Unnecessary Complexity

One goal that agencies should consider is avoiding unnecessary complexity. Robust procedural rights to access government files introduce complexity and are warranted in some cases, but certainly not in all. For example, administrative discovery—seemingly the gold standard of records and access akin to civil proceedings in court—is far from ideal in every circumstance. In the civil litigation context, although

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com/2025/08/08/politics/irs-dhs-share-taxpayer-data-undocumented-immigrants [https://perma.cc/43LK-BLZ2]; William Turton, Christopher Bing & Avi Asher-Schapiro, *The IRS Is Building a Vast System to Share Millions of Taxpayers' Data with ICE*, ProPublica (July 15, 2025, at 11:45 ET), https://www.propublica.org/article/trump-irs-share-tax-records-ice-dhs-deportations [https://perma.cc/8WLZ-JEQ2]; Matt Bracken, *IRS's Data-Sharing Deal with ICE Will Lead to 'Dangerous' Mistakes, Digital Rights Group Argues*, FedScoop (July 11, 2025), https://fedscoop.com/irss-data-sharing-deal-with-ice-will-lead-to-dangerous-mistakes-digital-rights-group-argues/ [https://perma.cc/SZK3-GG6P]. Litigation on this issue is ongoing as of this Article going to print. *See Group Seeks Stay, Injunction to Stop IRS Data Sharing with ICE*, TaxNotes (Aug. 20, 2025), https://www.taxnotes.com/tax-notes-today-federal/information-exchange/group-seeks-stay-injunction-stop-irs-data-sharing-ice/2025/08/21/7sy16 [https://perma.cc/C3KD-DSKP] (describing pending proceedings).

346 *See* text accompanying notes 157–59.

347 *See* text accompanying notes 157–59.

discovery was meant to be cost-saving by exposing the truth and eliminating the need for trials in many cases, discovery has become a costly and contested part of litigation itself, giving rise to abuses.[348] Moreover, its increasingly contested nature often requires the expertise afforded by representation.[349]

Instances where formalized discovery rules are necessary to protect the interests of private parties are typically those where the government is exercising its enforcement powers to potentially punitive ends. For example, in immigration court, discovery is all but nonexistent; yet many documents that noncitizens may need to defend against a removal case remain hidden in government files.[350] This dynamic leads to voluminous FOIA requests submitted by those parties in lieu of discovery rights.[351] As documented elsewhere, this dynamic promotes neither efficiency nor fairness to the private parties.[352]

The IRS is another example of an agency that undertakes enforcement proceedings with high stakes and few formalized discovery rights. Recognizing this problem, Congress in 2019, as part of the Taxpayer First Act, required the IRS to make the case file available at the appeals stage, which is seemingly helpful to the taxpayer,[353] but the implementation of this provision has been criticized for not providing the taxpayer with the full access that is needed to effectively advance their claims in some circumstances. Some have pointed to the IRS's exclusion of parts of the case file—particularly prior communications from the taxpayer to the IRS—as problematic, particularly in cases where the communication may be important to evaluating whether the IRS followed proper procedures.[354] Others have criticized the IRS's narrow reading of the portion of the statute that requires the IRS to provide the case file regarding the "disputed issues," pushing some taxpayers to file a FOIA

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348 Jay E. Grenig & Jeffrey S. Kinsler, Handbook of Federal Civil Discovery and Disclosure § 1:5 (4th ed. 2025).

349 *See* Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 Colum. L. Rev. 1423, 1428 (2022) (noting that complexity can harm unrepresented litigants and noting that discovery issues can increase complexity).

350 *See* Heeren, *supra* note 41, at 1569–70 (describing this dynamic).

351 *See* Kwoka, *supra* note 15, at 2224–30 (describing the uses of FOIA in lieu of discovery).

352 Kwoka, *supra* note 285, at 80–92.

353 Memorandum from Patrick E. McGuire, Acting Dir., Case & Operations Support, to all IRS Indep. Off. of Appeals Emps. 2 (June 14, 2024), https://www.irs.gov/pub/foia/ig/spder/ap-08-0624-0011-public.pdf [https://perma.cc/DVV4-BCSQ].

354 *See id.* (excluding documents provided by the taxpayer from what is accessible under the Taxpayer First Act); Caleb Smith, *Is IRS Appeals Using the Taxpayer First Act to Restrict Taxpayer Access?*, TaxNotes (July 23, 2021), https://www.taxnotes.com/procedurally-taxing/irs-appeals-using-taxpayer-first-act-restrict-taxpayer-access/2021/07/23/7h51t [https://perma.cc/W9GH-R5FC].

request even where the officer handling the case has accessed the case file and could easily provide it.[355]

Moreover, the outcome of the case at the Independent Office of Appeals stage is not even routinely released. Once a case has reached a resolution at the Appeals stage, the Independent Office of Appeals issues an Appeals Case Memorandum—which is a summary of the issues and the recommended resolution—for submission to an Appeals Team Manager for resolution.[356] These documents are, in effect, the decisional documents of Appeals. The Taxpayer Advocate Service has recommended that Appeals provide these memoranda to the taxpayer,[357] but the IRS has so far declined.[358] Still, these documents can be obtained, at least in large part, under FOIA, and as a result may push taxpayers to file FOIA requests despite a seemingly more helpful disclosure regime.[359] As a result, formalized discovery may be burdensome, but in some instances it is nonetheless still the gold standard for protecting the integrity of the proceedings, and alternatives should be implemented only when equally effective for the private parties.

In instances where full formal discovery may not be necessary, certain administrative costs can be avoided. Interestingly, even some more formalized proceedings—including some where the stakes are very high indeed—tend not to have formalized discovery rules when the private parties involved are generally individuals, rather than businesses. Those proceedings involving individuals are also contexts where there is a higher volume of adjudication.

At the NLRB, once a ULP charge is filed, it is docketed and assigned a case number,[360] and seemingly quite formalized procedures attach. Each party is asked to submit evidence, the respondent is asked to submit a position statement, and the staff can interview people as they deem necessary.[361] After the investigation, a regional director—who works on the prosecutorial side of the NLRB headed by the NLRB's independent general counsel—may decide that the charge does not have sufficient merit and recommend withdrawal or dismissal,

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355 Leslie Book, Cumbee *Highlights Limits to Case File Access and Liability Challenges*, 185 Tax Notes Fed. 1445, 1447 (2024).

356 IRS, Internal Revenue Manual § 8.6.2 (2025), https://www.irs.gov/irm/part8/irm_08-006-002 [https://perma.cc/A4DF-MBWX].

357 Taxpayer Advoc. Serv., National Taxpayer Advocate Objectives Report to Congress: Fiscal Year 2026, at 35 (2025), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2025/06/JRC26_FullReport.pdf [https://perma.cc/29E2-XZZV].

358 Taxpayer Advoc. Serv., 2023 National Taxpayer Advocate Annual Report to Congress Most Serious Problems Encountered by Taxpayers Administrative Recommendations: IRS and TAS Responses 71 (2023), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/09/2023_ARC_Report_Card.pdf [https://perma.cc/29VG-BN3C].

359 *See* Taxpayer Advoc. Serv., *supra* note 357, at 35 n.40.

360 29 C.F.R. § 101.4 (2025).

361 *Id.*

refer the case for mediation for settlement, or issue a complaint against the respondent to be heard before an ALJ.[362]

Yet there is almost no opportunity for discovery. The investigator, who is in regular communication with the parties, may provide information submitted by the opposing party if needed for a response, but must first obtain the consent of the General Counsel.[363] Otherwise, the full investigatory file is not available to the parties,[364] and under FOIA, information is not released during the pendency of the case pursuant to exemption 7(A), which covers records "compiled for law enforcement purposes" and which "could reasonably be expected to interfere with enforcement proceedings."[365] If a case gets to a hearing, there are no discovery rules that allow the parties to access the opposition's evidence.[366] As such, the parties must issue subpoenas,[367] which are not returnable until the day of the hearing,[368] though ALJs often will open the hearing for the return of the subpoenas and then stay proceedings to allow review of the evidence.[369] Otherwise, the hearing would be more or less a trial by ambush, with surprise evidence on both sides. These proceedings are ones where the lack of discovery appears to affect the integrity of the proceedings.

Informal disclosure techniques can also be effective in instances where formalized discovery is not necessary to protect private party

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362 *See id.* § 101.5–.8.

363 *Cf.* Memorandum from Crystal S. Carey, Gen. Couns., NLRB, to Reg'l Dirs., Officers-in-Charge & Resident Officers, NLRB 3 (Feb. 27, 2026), https://apps.nlrb.gov/link/document.aspx/09031d45841ea072 [https://perma.cc/VAN8-RDSP] (requiring that requests for evidence should "provide adequate information for the charged party to respond appropriately").

364 *See* NLRB, Bench Book: An NLRB Trial Manual 70–71 (Jeffrey D. Wedekind et al. eds., 2025), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/2025-nlrb-alj-bench-book-final_0.pdf [https://perma.cc/TFF7-DGXM].

365 *See* 5 U.S.C. § 552(b)(7)(A); *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 235–36 (1978) (holding that ULP proceedings are exempt from FOIA exemption 7(A)).

366 *See* NLRB, *supra* note 364; *see, e.g.*, *In re* Offshore Mariners United, 338 NLRB 745, 746 (2002) (concluding that pretrial discovery is not required by either the Constitution or the statutory provisions that govern NLRB proceedings). Moreover, an NLRB rule specifies that no former or current employee will produce any files, documents, or reports of the Board without the consent of the General Counsel. 29 C.F.R. § 102.118(a) (2024). This rule was adopted as a means to protect employees and witnesses from reprisal and harassment and avoid the delay and collateral disputes associated with discovery. NLRB, *supra* note 364, at 70.

367 *See* 29 C.F.R. §§ 102.31(a), .66(f) (2024); NLRB, *supra* note 364, at 73.

368 *See In re* McAllister Towing & Transp. Co., 341 NLRB 394, 394 (2004) (describing how, in one case, the respondent was served with a subpoena twelve days prior to hearing, and when the respondent petitioned to revoke the subpoena because the request was burdensome and overbroad, the ALJ told the respondent's counsel that she would rule on the petition to revoke the subpoena at the hearing the next day, but that the respondent "should be ready to 'substantially comply' with the subpoenas the following morning").

369 *See* NLRB, *supra* note 364, at 51 (giving the ALJ the discretion to continue a "trial 'from day to day, or adjourn . . . to a later date . . . [with] appropriate notice'" (quoting 29 C.F.R. § 102.43 (2024))).

interests and informal disclosure is well designed. For example, in SSA proceedings, although hearings are held before an ALJ, there is no discovery within the proceeding; instead, access to the case file is provided by contacting the regional office that processed the file.[370] This less formalized access represents a customer-service-oriented model, and one that appears quite effective for the private party population served.

Similarly, for regulatory agencies that engage in enforcement proceedings against regulated entities, it seems that efficiencies are gained when the office conducting the investigation communicates directly with the target of the enforcement action regarding the information about the violation, and diverting those efforts to a FOIA office is likely to result in redundancies of effort. With physical inspections, the agency already has a direct point of contact with the regulated entity, and the regulated entity is typically a repeat player well-versed in communicating with the agency.[371]

At other agencies, though, opportunities for greater information sharing were evident. At CBP, customs inspections at ports of entry also produce information that is actionable for enforcement, but unlike the other contexts, such inspections are voluminous and do not involve ongoing contact between the private party and the officer.[372] As such, private parties are often diverted into making FOIA requests.[373]

In each instance, an agency should consider whether the stakes for private parties, the information needs of private parties, and the efficiencies for the agency require formal discovery rules. Where individuals are turning, en masse, to FOIA to fill in for discovery needs, agencies should consider whether discovery can better protect the rights of private parties. In agencies with a less adversarial role, however, informal disclosure regimes may be able to fill in the gap. In other instances, the relationship between the regulator and regulated entity may allow for less formal information sharing. In all instances, however, the lack of discovery should be based on the needs of the private party and in no case denied out of a desire for bureaucratic streamlining.

D. Empowering the Public

Another consideration that agencies should use in designing their records management practices is whether they can engage in a practice that empowers the public to self-serve the information they need. When individuals can easily access relevant information on their own, that

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370 *Privacy Program: A Central Source for Information About SSA's Privacy Compliance Program*, *supra* note 178.

371 *See supra* Part II.C.

372 *See supra* text accompanying notes 258–60.

373 *See supra* text accompanying notes 263–64.

process has the potential to serve the private party better by providing them with instantaneous access and serve the government better by reducing the burden of individualized information requests.

One such strategy is the creation of self-service portals. ACUS has previously found many potential benefits to the use of portals to engage with agencies, specifically that they can "make adjudication systems easier to use and more accessible to the public, reduce the administrative burden on agency staff, and increase the accuracy of information collected during adjudication."[374] ACUS also acknowledged, however, risks of poor design, cybersecurity threats, and the costs associated with building and maintaining such tools.[375]

Some agencies studied in this Article exhibited extremely successful portal strategies. Portal access at PBGC was quite successful in reducing FOIA burdens, for example, and portal access has been rolled out for medical records at the VA, for records of proceedings at the BIA, and for case files at the NLRB, among others.[376] In addition to making access to records immediate, portals also allow agencies to provide the public with a way of conducting basic transactions in a self-service fashion.

Still, the existing portals demonstrate some of the constraints and limitations of this strategy. Portal access is more straightforward for those types of records where little to no review and redaction is necessary.[377] The clearest cases are for records that individuals themselves previously submitted to the agency and communication that the agency has or wants to issue to the private party about the proceeding.[378] For example, USCIS has begun to use some portal access that is largely limited to these kinds of records contained within an A-File, but not for the full A-File of all immigration-related records about a noncitizen.[379]

Moreover, creating portals requires upfront investments in technology infrastructure and resources from program offices handling the records on the front end. Agencies face additional hurdles when trying to backfill records that are not yet digitized.[380] In addition, for some sets of individual records, the majority of concerned individuals may never need or request those records, in which case they are being processed and placed into portals potentially needlessly. This is the case, for example, at the EEOC where the Agency receives almost 90,000 charges

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374 Adoption of Recommendations, 88 Fed. Reg. 42,678, 42,682 (July 3, 2023).

375 *Id.* ACUS also noted the need to ensure accessibility requirements are met, as well as providing access in non-English languages. *Id.* at 42,682–83.

376 *See supra* Part II.D.

377 *See supra* Part II.D.

378 *See supra* Part II.D.

379 *See* Homeland Sec. Sys. Eng'g & Dev. Inst., *supra* note 264, at 62.

380 *See id.* at 47.

of discrimination each year, but only about 15,000 FOIA requests for charge files.[381] Proactively processing more of them and putting them in the portal may not be a good use of Agency resources. This is particularly true for records, like charge file investigatory records, that need to be reviewed and potentially redacted.

Still, even in those cases where review and redaction may currently be necessary, some of the burden of individualized review may be alleviated by strategies sometimes referred to as transparency by design. These strategies involve up-front document design to ensure that any information that cannot be made public is kept separately or in an automatically redacted portion of the document.[382] That makes the document "born FOIA ready" and allows easy posting to portals and release to a requester. The NLRB has engaged in this strategy with success with case decisions, redesigning key case records to minimize the use of private information and ensure that such information can be automatically redacted for immediate posting on a public-facing website.[383]

Agencies should also consider the possibility of affirmative disclosure where it is possible to do so in a useful way. These efforts have borne fruit, particularly where agencies can publish full databases, searchable and indexed, of records that reflect the final decisions of those agencies as to the rights or obligations of members of the public in instances where those decisions have some utility as precedent, even if far from binding.

These databases do go a long way in providing the kind of access that private parties need, but their utility is dependent on thoughtful design and adequate technology infrastructure. For a database to be truly useful, it must also be resourced, complete, searchable using metrics that are useful to the parties in future proceedings, and updated with new records as soon as they are available. A well-designed database is likely to cut down drastically on FOIA requests for those same records, as well as increase the fairness of future proceedings for all parties. Indeed, a previous ACUS study has described the impact that well-designed databases have as related to precedential decisions;[384] the same considerations easily apply to nonprecedential decisions that are nonetheless of use to members of the public in their own proceedings.

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381 *See supra* notes 225, 299 and accompanying text.

382 *See* Arianna Rossi & Gabriele Lenzini, *Transparency by Design in Data-Informed Research: A Collection of Information Design Patterns*, 37 Comput. L. & Sec. Rev. 3 (2020).

383 *See* NLRB, 2023 Chief FOIA Officer Report 7 (2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-178/nlrb-2023-chief-foia-officer-report-final.pdf [https://perma.cc/GFD9-5XET].

384 *See* Walker, Wasserman & Wiener, *supra* note 249, at 41–43.

EOIR's recent move to make available online a database of unpublished and nonprecedential opinions in response to a settlement agreement in litigation is the kind of step that is needed. Still, though, it has so far fallen short in two respects. First, the publication of decisions comes with a significant lag, and it can be up to a year before decisions are available to the public.[385] This can be of particular hindrance in situations where the political conditions of a country are changing in a way that has quickly shifted the BIA's jurisprudence. Second, the public search function is extremely limited. It does not allow for keyword search, much less any sort of advanced search function that would allow traditional case law research by lawyers.[386]

Yet internally, the BIA maintains its own unpublished decisions in a highly searchable form, something that has facilitated the BIA's efforts at consistency in decision-making and even taking cases en banc for review when the BIA finds inconsistency.[387] It seems logical for the BIA to be making use of its internally available database, if for no other reason than that the volume of decisions it must contend with would otherwise be unworkable. Indeed, decision-making relies on a staff attorney model under which those individuals prepare and draft proposed decisions, which the appellate immigration judges—members of the BIA—then review and approve.[388]

In general, as to any of these disclosure methods, one consideration for agencies in designing access procedures for records related to agency proceedings should be whether an alternative access option has the potential to cut down on the burden of the FOIA office to process individual requests. Many of the strategies detailed in this Article have the potential to confer this benefit.

For example, when PBGC created portal access, it appeared to have cut down on the number of individual requests that have to be

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385 *See Reading Room*, *supra* note 256 (as of April 2, 2026, showing the last group of unpublished decisions available as ending on June 30, 2025).

386 *See Reading Room Search Tips*, Exec. Off. for Immigr. Rev., DOJ, https://foia.eoir.justice.gov/app/SearchTips.aspx [https://perma.cc/4PLE-DQK5] (last visited May 10, 2026); *see generally* Sayed, *supra* note 252 (indicating that despite the settlement in *New York Legal Assistance Group v. Board of Immigration Appeals*, there may be additional obstacles to transparency and accessibility of previously unpublished decisions); Stipulation of Settlement, *supra* note 255 (detailing settlement terms).

387 *See* Sayed, *supra* note 252, at 916 (noting that the BIA maintained an "indexing" system for certain unpublished decisions and explaining that "[l]ogically, the [BIA] must have used these decisions to guide its decision-making in unpublished and published opinions"); *see also* Ira J. Kurzban, Kurzban's Immigration Law Sourcebook 1436 (14th ed. 2014) (indicating the same).

388 *See Attorney Advisor GS-0905-13/14/15*, DOJ (Apr. 4, 2025), https://www.justice.gov/legal-careers/job/attorney-advisor-gs-0905-13 [https://perma.cc/UCR6-FN9F]; *see generally* Exec. Off. for Immigr. Rev., DOJ, BIA Practice Manual (2021), https://www.justice.gov/eoir/reference-materials/bia [https://perma.cc/WKN2-V4NT] (describing decision-making process).

filed, perhaps by as much as half.[389] PBGC describes the portal as providing access to some first-party information "[w]ithout the need to file a FOIA request."[390] The FOIA office does not run the portal, but rather the Office of Benefits Administration does so.[391] At CBP, the creation of a database of import duty letter rulings cut down on FOIA requests that had been made for individual ruling letters.[392]

E. Centering Customer Service

Finally, agencies should consider whether their particular program is best served by taking a customer-service approach to providing records. Sometimes the locus of that customer service is within the FOIA office, and sometimes it is elsewhere; but wherever individualized attention is best serving the private party population, agencies should invest in its success.

To begin, although finding alternatives to FOIA that improve upon that default access right both for the agency and for members of the public is a laudable goal, for some agencies it may not be necessary if FOIA is working particularly well. At EEOC, PBGC, and the VA, for example, FOIA is fully resourced, there are no backlogs, and the FOIA offices ensure that the requesters with needs for their records vis-à-vis agency proceedings get what they need in a timely fashion. At PBGC, the FOIA office is well staffed, and the staff are attuned to the fact that for the beneficiaries of the plans that they administer, access to a copy of the file is key.[393] Moreover, the FOIA office maintains a customer-service-oriented approach, allowing for FOIA staff to be of greater assistance to the target population, which is necessarily comprised of older individuals who may need greater personal service.[394] Given that the average number of days to process a simple request in fiscal year 2024 was 10.28 and for complex requests it was 12.56, well below the statutory requirement, and even the longest complex request

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389 Kwoka, *supra* note 285, at 190; *see also Report Results*, FOIA.gov, https://www.foia.gov/data.html/results [https://perma.cc/UY4X-U8XT] (last visited July 9, 2026) (the requests received after PBGC created portal access were less than half of the total received in 2010 and 2011).

390 *See* C. Paul Chalmers, Pension Benefit Guar. Corp., 2025 Chief FOIA Officer Report 13 (2025), https://www.pbgc.gov/sites/default/files/documents/pbgc-2025-chief-foia-officer-report.pdf [https://perma.cc/APB3-KZA2].

391 *Id.* at 19.

392 *See Rulings and Legal Decisions*, *supra* note 246.

393 *See* Examination and Copying of PBGC Records, 87 Fed. Reg. 43,991, 43,991 (July 25, 2022) (to be codified at 29 C.F.R. pts. 4001, 4901); *MyPBA: My Pension Benefit Access*, *supra* note 211 (stating that access to an individual's files allows that individual to manage their PBGC benefits).

394 *See* Examination and Copying of PBGC Records, 87 Fed. Reg. at 43,991; Pension Benefit Guar. Corp., 2024 Annual Report 1 (2024), https://www.pbgc.gov/sites/default/files/documents/pbgc-annual-report-2024.pdf [https://perma.cc/G4DM-CUGA].

took sixty-seven days, FOIA may well be working for this purpose.[395] A similar dynamic can be seen at the VA, where processing times are very quick and the requester population is mostly made up of veterans who are accustomed to using FOIA in this way and tend to eschew alternatives.[396]

At the EEOC, similarly, the regional offices—where charge file requests are processed—have essentially no backlog.[397] Indeed, the average processing times for the regional offices are uniformly under twenty business days, and only a tiny number of requests are reported to take longer than forty.[398] Although the EEOC once had a backlog problem for charge file requests, in 2018 and 2019 it implemented a backlog reduction plan that was ultimately quite successful.[399] One way that it improved processing was that the EEOC digitized the process so that workload could be shifted from one field office to another if one was overloaded.[400] Still, most requests are processed by the office that handled the charge and thus has the greatest equity in the records and thus the most expertise.[401] The EEOC has committed more to the FOIA

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395 Pension Benefit Guar. Corp., Report to the Attorney General of the United States for the Period of October 1, 2023–September 30, 2024, at 6, 21 (2024), https://www.pbgc.gov/sites/default/files/documents/fy24-foia-annual-report.pdf [https://perma.cc/AT9C-7SZ4].

396 *See* U.S. Dep't of Veterans Affs., FOIA Annual Report 33–34 tbl. VII.A. (Mar. 18, 2025), https://department.va.gov/foia/wp-content/uploads/sites/6/2025/04/FY2024_Annual_Report.pdf [https://perma.cc/6H8S-LQXF] (showing that the median processing time for simple requests in fiscal year 2024 was two days and for complex requests it was three days).

397 *See Fiscal Year 2024 Report of the Equal Employment Opportunity Commission on Its Administration of the Freedom of Information Act (FOIA), 5 U.S.C. § 552*, EEOC, https://www.eeoc.gov/fiscal-year-2024-report-equal-employment-opportunity-commission-its-administration-freedom [https://perma.cc/DZ4W-JAHU] (last visited June 9, 2026).

398 For example, in fiscal year 2024, all components of the EEOC except headquarters reported average processing times below twenty days, and at nonheadquarters components, only five requests were reported to take longer than forty business days. *See id.*

399 *2020 Chief FOIA Officer Report for the Equal Employment Opportunity Commission*, EEOC, https://www.eeoc.gov/foia/reports/2020-chief-foia-officer-report-equal-employment-opportunity-commission [https://perma.cc/NFS4-FWDL] (last visited June 9, 2026) ("EEOC developed and implemented a backlog reduction plan, enabling it to achieve a 90% reduction in the agency backlog.").

400 *2019 Chief FOIA Officer Report for the Equal Employment Opportunity Commission*, EEOC, https://www.eeoc.gov/foia/reports/2019-chief-foia-officer-report-equal-employment-opportunity-commission [https://perma.cc/R4UH-R5N3] (last visited June 9, 2026) ("EEOC's backlog reduction plan included a multi-prong approach: (1) Implementing triage measures to process the 'simplest' of the FOIA requests placed in the simple track; processing the easiest requests as quickly as possible i.e., third-party requests; FOIA professionals in offices with no backlog were utilized to assist in processing backlogged FOIA requests . . . .").

401 *Id.* ("The district offices process the FOIA requests for the charge files located within the district."); *see also Questions and Answers: FOIA Requests for Charge Files*, *supra* note 295 ("Submit requests for charge files to the District Director responsible for the district, field, area or local office that investigated your charge."); *Freedom of Information Act Reference Guide*, EEOC (Feb. 2018), https://www.eeoc.gov/foia/freedom-information-act-reference-guide [https://perma.cc/

process because it protects the procedural rights of the requesters better than alternative processes insofar as it provides for well-understood exemptions, administrative appeals, and a right to bring a lawsuit, unlike its section 83 process, which is utilized far less frequently.[402] But the key is that the EEOC has appropriately resourced the process; otherwise, FOIA would not be as protective of individual rights.

Indeed, high-performing FOIA offices appear to give a level of service that populations who may have difficulty interacting with government agencies find more accessible than other options. Although some agencies that rely primarily on FOIA have created alternative access options for some of the very same records frequently requested under FOIA, those alternatives have not persuaded some populations to stray from FOIA. For example, the VA has invested heavily in portal access for health records, and PBGC has a portal for key plan documents for beneficiaries to access on their own.[403] But the populations that those agencies serve may be less comfortable using a self-service portal that requires identity verification through technological means than accessing records using the personal service that accompanies a well-run FOIA office.

To be sure, even for those agencies where FOIA is working well for the requester population and where backlogs and resources are not posing FOIA processing challenges, FOIA comes with some downsides for the requester population. One downside is that private interests—which are, by definition, served by these first-person uses of FOIA—will never qualify for the statutorily expedited processing, which focuses on public interests served by the request.[404] Another downside is that individuals have to engage a second agency process—FOIA—in addition to whatever underlying agency proceeding they are involved in. They may not be aware of FOIA and may face additional administrative burden in learning how to engage with that process and comply with its requirements. Some agencies have tried to minimize the risks of relying on FOIA by, among other things, clearly explaining the right to request records related to a proceeding. The EEOC, for example, has tried to minimize the risk that charging parties do not file a FOIA request when they should by providing explicit instructions in the notice of a right to sue.[405] A third—and perhaps most significant—downside is that many

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UC7D-RSRM] (stating that requests for "any other records" besides charge files must be submitted to the Office of Legal Counsel in Washington, District of Columbia, the headquarters office).

402 *See Freedom of Information Act*, *supra* note 298 (describing differences between the processes).

403 *MyPBA: My Pension Benefit Access*, *supra* note 211; *see supra* Section I.B.

404 *See* 5 U.S.C. § 552(a)(6)(E).

405 *See EEOC Form 161-B*, EEOC (Nov. 2020), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_161_b.pdf [https://perma.cc/G5DF-6N7B] ("If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in

agencies suffer from FOIA backlogs and long, even extreme, delays.[406] Waiting for necessary records necessarily burdens individuals in proceedings further.

Relying on FOIA may also create more burdens for the agency overall. For example, at CBP, the Trusted Traveler Programs generate thousands of FOIA requests per year concerning the reasons for denials.[407] If the program itself issued more satisfactory explanations for denials, or provided necessary justifications directly from the office, these requests would not need to be made. There is no independent benefit to FOIA, and, in fact, the FOIA office is not necessarily able to produce the information that the applicants want. A more customer-service-oriented approach from the program office might remove these from FOIA's ambit.

CBP also receives FOIA requests related to challenges to customs penalties that have been levied.[408] The FOIA office has to coordinate with several hundred ports of entry to locate the requested records, and oftentimes the penalty-challenge proceedings are stayed while waiting for the response to the FOIA request. Direct access to the officer handling the case or information sharing from that office would potentially be more efficient for both the private party and the Agency. Indeed, the EEOC's use of regional offices to improve response times would seem to support the view that centralization is not always efficient.

Moreover, simply creating a separate non-FOIA process to do nothing more than duplicate what FOIA can or should be doing does not necessarily make any real difference to the party to the proceeding. Rather, specialized request tracks may be justified when the particular records require different handling or expertise. At DHS, a 2024 study examined non-FOIA request alternatives and concluded that, as to A-File requests to USCIS, it is "unlikely that an alternative means of access would improve the response to A-File requests or not cause significant disruption during the transition to a new process."[409] Rather, recommendations for digitization, designing records to be immediately releasable, and improved records management held more promise. Still, given that agencies may employ this method successfully in some instances, it is worthy of consideration when the specialized nature of the record or the potential for improved servicing of those requests warrant separation from FOIA.

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writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, please make your review request within 6 months of this Notice." (emphasis omitted)).

406 Kwoka, *supra* note 15, at 2253–54.

407 *See* Homeland Sec. Sys. Eng'g & Dev. Inst., *supra* note 264, at 48–49.

408 *Id.*

409 *Id.* at 43.

Conclusion

The federal government's vast repository of records contains a wealth of information, including about countless individuals, their lives, their businesses, and their health. When agencies need information to determine whether someone is eligible for a benefit, in violation of a regulation, or entitled to a license, the agencies must decide what procedures to use to gather those records for the purposes of the proceeding and make them available to the concerned private party.

This Article treats this vast and disparate set of practices collectively, creating a framework for understanding agency procedural choices and detailing considerations that emerge as relevant in designing agency records practice. At base, the hope is that by seeing the connections between agency practices concerning the use of federal records in agency proceedings, one can imagine information management systems that improve fairness, accuracy, and efficiency of agency proceedings for all and center the private parties who must navigate government programs.