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State Administrative Decisions Census: Demonstrating The Need For More Openness

By Pierre-Paul Lemyre*

ABSTRACT

This article includes findings and recommendations resulting from a survey of the status of online access to administrative decisions across the fifty states of the U.S. This survey was conducted over the course of September 2016 and is based on and replicates the methodology developed by Sarah Glassmeyer for her State Legal Information Census, published in 2015. The main objective of this initiative is to expand our understanding of the level of online access to legal information in the U.S. to the field of administrative law. It demonstrates that access to administrative appeals suffers from the same barriers to access as judicial opinions, although at a more acute level. The reliance of many states on third-party commercial publishers for the provision of primary access is particularly problematic in the context of the current access to justice crisis, especially considering the potential for enhanced transparency provided by the Internet. To improve the situation, central panels and agencies should systematically self-publish administrative appeal decisions on their own websites (which may require redaction) and put emphasis on making them available “openly”, which involves taking steps beyond the simple provision of physical access.

Although in the United States electronic databases of legal information have been around since the mid-seventies, it is only much more recently that significant progress has been made in the provision of access over the Internet. Despite the pioneering work of the Legal Information Institute at Cornell University, which has been publishing a selection of federal materials online since the early 1990s,¹ access to state legal information is still uneven for the vast majority of U.S. citizens without privileged access to proprietary databases. While it may be easy to believe that information is accessible as soon as it is made available on an official state website, experts have agreed for many years that free and open access to legal

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¹ Graham Greenleaf, *The Global Development of Free Access to Legal Information*, in A HISTORY OF LEGAL INFORMATICS 56 (Abdul Paliwala ed., 2010).

information requires more than the mere provision of data.² In this line of thought, the Law.Gov initiative identified a set of principles that should govern the dissemination of primary legal materials in the U.S., including, for instance, avoiding limitations on access through terms of use or the assertion of copyright.³ On the international stage, the Declaration on Free Access to Law supports the same view by stating that “government bodies that create or control that [legal] information should provide access to it so that it can be published by other parties”.⁴

It is specifically with the intent of reviewing the free and open status of legal information across the fifty U.S. states that Sarah Glassmeyer (Glassmeyer) designed and undertook a State Legal Information Census⁵ in 2015. This study analyzed over 200 official websites providing access to three sets of data: codes, regulations, and case law.⁶ It resulted in the identification of at least fourteen barriers to accessing legal information, among which eight were sufficiently widespread to be systematically assessed.⁷ Each state was scored and ranked based on the openness of its legal publication practices.⁸ It demonstrated that although all states are now providing

²Thomas R. Bruce, *Some Thoughts on the Constitution of Public Legal Information Providers*, CORNELL UNIVERSITY LAW SCHOOL (2002), <https://www.law.cornell.edu/working-papers/open/bruce/warwick.html>; Daniel Poulin, *Fifteen Years of Free Access to Law* (2008), <https://lexum.com/sites/default/files/publications/2008-fifteen-years-free-access-law.pdf>.

³*A Proposed Distributed Repository of All Primary Legal Materials of the United States*, LAW.GOV, <https://law.resource.org/index.law.gov.html> (last visited Apr. 20, 2017).

⁴*Declaration on Free Access to Law*, THE FREE ACCESS TO LAW MOVEMENT, <http://www.falm.info/declaration/> (last visited Apr. 20, 2017).

⁵Sarah Glassmeyer, *State Legal Information Census: An Analysis of Primary State Legal Information*, SARAHGLASSMEYER.COM, <http://www.sarahglassmeyer.com/StateLegalInformation/wp-content/uploads/2014/04/GlassmeyerStateLegalInformationCensusReport.pdf> (last visited Apr. 20, 2017).

⁶*Id.*

⁷*Id.*

⁸*See id.*

some form of online access to primary legal information, no state is providing barrier-free access.⁹

The current census was undertaken in September 2016 with the aim of expanding the knowledge acquired about the level of online access to legal information across the fifty states to the field of administrative law. The approach and methodology developed by Glassmeyer was replicated in order to assess the websites of ninety-six official state agencies responsible for the production of administrative appeals. In states where a central panel is in place, its website was automatically surveyed. In states where administrative law judges (ALJs) are hosted within agencies, three major agency websites were visited. Websites included in the census were systematically analyzed in order to identify the webpages dedicated to the dissemination of written appellate decisions. The following questions were asked for each of them: Is the information provided official? Is it provided in an open file format? Are archives available? Are there any restrictions attached to reuse? Does the state claim a copyright on the information? Does the state publish by itself? Are there disclaimers about the usefulness of the data provided? Is full-text search provided?¹⁰

This approach made it possible to score each state on a scale of 0 to 8, with zero representing the absence of online access, and eight representing the provision of barrier-free access. The fact that the State Administrative Decisions Census and the State Legal Information Census share the same scoring mechanism makes it possible to compare the respective levels of access to administrative decisions and case law.

⁹*See id.*

¹⁰Glassmeyer explains in details how each question was determined in the section Methodology of her paper. *See Sara Glassmeyer, supra* note 6.

FINDING AT A GLANCE

The main finding of the census is that the level of online access to state administrative decisions is significantly lower in comparison to what it is for judicial decisions. On average, American states score 2.45 points, on a scale of 0 to 8, for accessibility of ALJ opinions. In comparison, they scored 4.8 on average for accessibility of judicial opinions in Glassmeyer's State Legal Information Census.¹¹ The overall average is dragged down by sixteen states that are not providing any access at all to their ALJ opinions on the Internet. In comparison, all states provide at least some form of online access to case law.

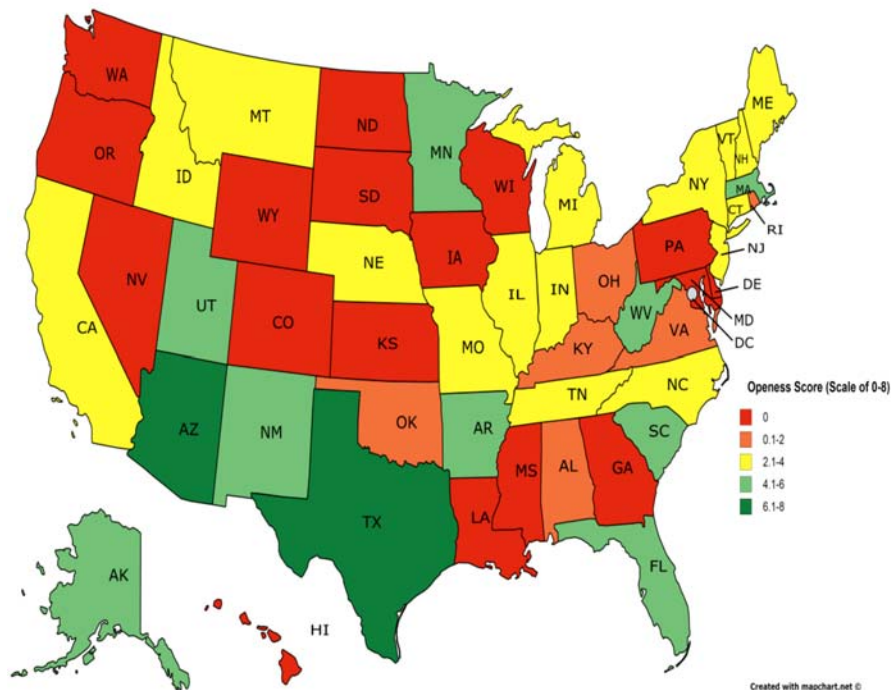
The best scores achieved in the State Administrative Decisions Census come from Arizona and Texas with 7 out of 8. Both states have a central panel that systematically publishes non-confidential decisions on their respective websites. Both provide search tools dedicated to accessing decisions, as well as archived material for at least the last seven years. The Arizona Office of Administrative Hearings¹² would achieve a perfect score if it was not for the claim of copyright found in the footer of its website, which creates doubt about the legal right of users to reuse the data. The Texas State Office of Administrative Hearings¹³ fails to achieve the perfect score because it limits publishing to PDFs and does not provide the decisions in any alternative open container (HTML for instance). Just as for case law, no state provides barrier-free access to administrative decisions.

¹¹ See Glassmeyer, *supra* note 6.

¹² ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS, <http://www.azoah.com> (last visited Apr. 21, 2017).

¹³ STATE OF TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS, <http://www.soah.texas.gov> (last visited Apr. 21, 2017).

Openness of Administrative Decisions



The census shows that, when it comes to providing basic online access to ALJ opinions, many states are abdicating their role to commercial publishers. Notices specifying that appellate decisions can be found on Westlaw and/or LexisNexis databases were found on some of the websites surveyed¹⁴. It is obvious that the fees charged by those providers can be considered as one of the most important barriers to access for many direct users. This model also bars wholesale providers from re-purposing the data into other information systems.

States that do provide online access to administrative decisions generally do a better job when publishing judicial opinions. For instance, websites of agencies include archives of decisions 10% less often than websites of courts, and the median date of availability of

¹⁴ See e.g., *Office of Administrative Hearings - Decisions*, NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS, <http://www.ncoah.com/hearings/decisions/> (last visited February 14, 2017).

archives is 2001 for administrative decisions, against 1997 for judicial opinions¹⁵. The data collected also indicate that 56% of websites providing access to administrative decisions claim a copyright on content, against 43% in the context of case law publishing. One final example is that 79% of websites publishing administrative decisions include a full-text search engine, against 84% for websites publishing case law.

Before weighing those numbers, it should be noted that the census also highlighted a certain number of specificities related to the online publishing of ALJ opinions:

- The official status of the decisions published is far less important in the context of administrative appeals than it is for case law. This can be explained by the fact that only some administrative decisions are deemed precedential, and some are not. Overall only five states appear to systematically include administrative appeals in official printed publications.
- While many states appear to rely on commercial publishers to take care of the publishing of administrative appeals by themselves, such enterprises are less involved in the online publication of administrative decisions on behalf of the states in comparison with case law. With the exception of one website operated by Thomson Reuters and two operated by state universities, all websites providing access to administrative decisions are under the direct control of the corresponding state.
- Because of the topics involved and the nature of the decisions rendered, a higher percentage of administrative decisions require redaction of parties' names and personal information prior to online publishing. This leads to higher publishing costs for agencies, increases publishing delays, and explains why archives are often not exhaustive.

These specificities imply that some barriers that were evaluated are less relevant in the context of administrative decisions than they are for case law. That being said, the scoring model developed by Glassmeyer in 2015 was nonetheless retained in order to enable comparison between the two censuses. In this context, the focus

¹⁵ See Glassmeyer, *supra* note 6.

should be put on the ratios between the two sets of results, rather than on individual scores.

RECOMMENDATIONS

When compared to other types of legal information they produce, there is no doubt that states are lagging behind when it comes to providing online access to administrative decisions. Central panels and agencies are encouraged to bridge this gap by opening up to the rest of the world what can be considered as the end result of their adjudicative process. They need to do so quantitatively, by releasing material that has remained hidden on internal servers until now. They also need to do so qualitatively, by removing some of the barriers that currently reduce the re-use potential of the data.

On the bright side, the fact that almost all states control the complete publishing process of administrative decisions should facilitate the operation. In comparison with case law publishing, which often requires input from people operating in distinct institutions—including commercial publishers, the publishing of administrative decisions is relatively centralized. Although the greater need for redaction introduces some level of complexity, at least the capacity to decide and take action lies in one single chain of command.

In this perspective, the following recommendations should guide future initiatives impacting the accessibility of ALJ opinions:

- In some states, the adoption by legislatures of transparency policies forcing agencies to make their decisions available on their own websites may be one way forward. This approach has the benefit of permanently answering any questions staff may have about the legality of disseminating agencies' decisions over the Internet. One such example is Act 896 of the 2015 Arkansas General Assembly,¹⁶ which introduced the obligation for the Arkansas Department of Finance and

¹⁶ S.B. 490, 90th Gen. Assemb., Reg. Sess. (Ark. 2015). This act was “[a]n Act to amend the laws concerning the administration of state taxes; to improve the fairness of tax administration by eliminating prepayment conditions for appeals, adjusting the taxpayer burden of proof, equalizing the limitations period for refunds, promoting transparency in tax administration” *Id.*

Administration to post its opinions on the government website after redacting confidential information.

- In general, emphasis should be placed on publishing “openly”: In other words, effort should be made to eliminate the various barriers assessed in this census. The simple provision of availability is not enough if technical, legal, and social restrictions pose some major limitations on re-use by both direct users and wholesale providers. Opening access to direct users enables those affected to align their conduct on the guidance provided by appellate decisions. Opening access to wholesale providers has the potential to increase the reach of decisions by facilitating their incorporation into new datasets.
- Self-publishing should be favored over third party publishing of online administrative decisions. This does not mean avoiding outsourcing - on the contrary; it simply implies that the state should retain control over the publishing process. Publishing of case law has shown that reliance on commercial publishers as substitutes generates barriers of its own that can dramatically reduce the level of access to information. States should zealously preserve the full control they currently enjoy over the publishing of administrative decisions and not hesitate to impose requirements for openness when subcontracting tasks in this regard.
- When implementing projects aiming to improve access to administrative decisions, agencies should consider existing solutions already aligned with the best practices of the field. The bespoke development of new features by IT staff without a broader perspective of what openness implies is most likely to result in the introduction of new barriers. In contrast, some states and IT providers have designed solutions that already specifically address those issues.¹⁷

¹⁷ For complete transparency, Lexum is promoting a self-publishing legal decisions platform called Decisia. For more info, see <https://lexum.com/en/products/decisia/>.

WHY DOES IT MATTER?

Anyone operating in or near the legal system over the last few years has heard appeals to improve access to justice. Surveys show that a growing number of Americans are under the impression that, when wronged, obtaining justice through the official channel is beyond their financial capacity.¹⁸ Access to justice has become a crisis requiring immediate intervention, and improving access to legal information is one of the first and easiest steps to be taken in this direction. This is especially relevant to the field of administrative law, since it involves conflicts between the state and citizens; citizens often perceive barriers to access as originating from one-sided policies. Administrative appeals take on special importance in this context, as they often are the first judicial step in an escalating conflict. ALJs are the first judges encountered by many citizens, and a better understanding of what motivates their decisions is fundamental to the perception of whether the system considers them.

Notably, free and open online access to legal information helps to improve access to justice in different ways. The most evident situation is illustrated by the self-represented litigant preparing his own hearing by researching past decisions on the official state website. That said, a much greater number of citizens use the same information to align their conduct before even reaching the hearing stage or having to consult a lawyer. While it is impossible to reach all citizens directly over official websites, free and open access to legal information entails that wholesale providers have the capacity to agglomerate, comment, and enhance the data for different audiences. This includes non-governmental organizations (NGOs) that develop assistance programs that are instrumental in simplifying the intricacies of the legal system for the greatest number of individuals.

Answers to the access to justice crisis should take into consideration the fact that the Internet has become the primary place to access information. Citizens across all categories now expect information to which they are entitled to be available online, especially official information produced by the state. While some constituencies undoubtedly require other forms of access (printed, in

¹⁸ *WJP Rule of Law Index 2015: United States*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/USA> (last visited February 14, 2017).

person, etc.), this preference has become secondary in terms of volume of access. In this context, when it comes to sharing information with stakeholders, online access should be at the forefront of agencies' priorities.

The role of the Internet as a source of information has long been identified as a way to strengthen the transparency of the judicial and administrative systems.¹⁹ Bentham famously stated that "publicity is the very soul of justice"²⁰ because it favors impartiality, which is key in gaining the confidence of citizens in their institutions. In 2016, posting the decisions resulting from the adjudication process on the Internet has become the surest way of achieving that result.

Finally, agencies should pay attention to the status of online access to their decisions for their own benefit. The increased circulation of their decisions and the citations that ultimately result from it (whether formal citations or simple web links) help to enhance the credibility of the decision-maker in his or her field of expertise. Over the long term, this also contributes to the development of the field of law in which an agency operates, creating a body of knowledge shared among all of those interested in the matter. In the end, whether individual decisions may be precedential or not loses importance in comparison with the general principles extrapolated from the overall collection of documents.

METHODOLOGY

The State Administrative Decisions Census follows the methodology developed by Sarah Glassmeyer for the State Legal Information Census, which is fully available online on the author

¹⁹ Daniel Poulin, *Open Access to Law in Developing Countries*, FIRST MONDAY (Dec. 2014), http://firstmonday.org/ojs/index.php/fm/article/view/1193/1113_2.

²⁰ JEREMY BENTHAM, BENTHAM'S DRAUGHT FOR THE ORGANIZATION OF JUDICIAL ESTABLISHMENTS, COMPARED WITH THAT OF THE NATIONAL ASSEMBLY, WITH A COMMENTARY ON THE SAME, THE WORKS OF JEREMY BENTHAM 316 (John Browning ed. 1843).

website.²¹ This is possible through the licensing of the complete work under a Creative Commons Attribution 4.0 International License.²²

During the month of September 2016, the author visited websites of official institutions responsible for the hearing of administrative appeals from every state. In total, he visited ninety-six websites. He made efforts to identify the webpage(s) providing access to written appellate decisions. When such webpage(s) were identified, a set of fifteen data points were collected and saved in the spreadsheet included in Appendix I – Census Data.

The data was then analyzed with the objective of assessing how each of the eight major barriers to access to legal information identified by Glassmeyer currently affects administrative decisions. Some of the results of the State Administrative Decisions Census enabled comparison with the sub-set of data from the State Legal Information Census related to case law. Data collected by Glassmeyer in relation to codes and regulations was simply not taken into account for the purpose of those comparisons.

The main challenge addressed over the course of this process was the variable structure of decision-makers producing administrative decisions in the US. About half of the American states (twenty-seven) have put in place a central panel agency mandated to hear administrative appeals originating from various state agencies. However, some central panels are responsible for all appeals across the state and others for only a few agencies. In the remaining states (twenty-three), ALJs operating from within their respective agencies heard appeals. For consistency, the author decided to scrutinize the central panel website whenever available and to fall back on three major state agency websites when not available. In the latter situation, he systematically identified and analyzed agencies that rendered appellate decisions in the following three sectors of activities: worker's compensation, motor vehicles, and taxation.

²¹ Glassmeyer, *supra* note 6.

²² *Attribution 4.0 International (CC BY 4.0)*, CREATIVE COMMONS CORPORATION, <https://creativecommons.org/licenses/by/4.0/> (last visited May 12, 2017).

BARRIER #1: OFFICIAL STATUS

For every website visited that provides access to administrative decisions, the first element assessed is the official status of the documents. This process involves determining if the decisions made available online can be cited in future appeals, or if another version of the document with greater authority is to be preferred instead (such as a printed version for instance). This barrier is prevalent in the context of case law, for which court rules often prescribe citation standards imposing exclusive reference to the “official” source of law. This kind of rule proscribes any serious use of the online version as long as it is not officially recognized. However, the situation is different in the context of administrative procedures since administrative appeals are not necessarily precedential, and very few are published in any other official state publication.

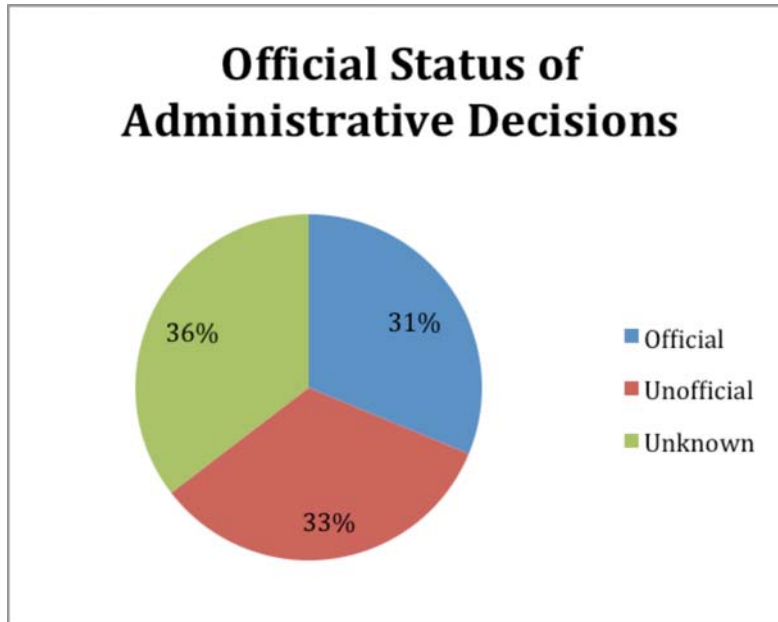
This distinction explains why very few agencies specifically address the question of the official status of appellate decisions on their website. For this reason, the author decided to consider as official all decisions posted on websites including positive statements supporting the reliability of the data provided. On the contrary, the presence of disclaimers about the reliability of the information automatically resulted in the labelling of decisions as unofficial.

Even with this flexible interpretation, only fifteen out of the forty-eight agency websites publishing administrative appeals meet the criteria for official decision providers. The Alaska OAH website is one of them, stating, “[t]he Office of Administrative Hearings is responsible for making ‘final agency decisions reached after administrative hearings available online through an electronic data base.’ That data base can be accessed through this web page”.²³ However, sixteen other websites specifically include disclaimers to the contrary. For instance, the Michigan Administrative Hearing System specifies, “The State does not promise that Michigan.gov or any content, service, or feature of the website will be error-free or uninterrupted. Information is provided on an ‘as is’ and ‘as available’”

²³ *Decisions*, STATE OF ALASKA: DEPARTMENT OF ADMINISTRATION, OFFICE OF ADMINISTRATIVE HEARINGS, <http://doa.alaska.gov/oah/Decisions/index.html> (quoting Alaska Stat. § 44.64.090(a)) (last visited Feb. 14, 2017).

basis”²⁴ Finally, the official status of decisions was impossible to determine for another seventeen websites.

Altogether, it means that among the agencies surveyed, two-thirds of those publishing ALJ opinions online do it in a manner that theoretically precludes the re-use of these documents under their own jurisdiction. It is unclear if in practice an ALJ would indeed refuse to consider an argument based on this notion. Nevertheless, this situation generates doubt as to the usefulness of the decisions made available online, which in itself constitutes a barrier to access for potential users.



These numbers are substantially different from those obtained by Glassmeyer in 2015 for case law, where 88% of websites publishing judicial opinions provided unofficial versions of documents.²⁵ The difference is largely generated by the higher volume of unknown results for administrative decisions (36%) versus case law (3%). The fact that the official status of administrative decisions is often

²⁴ *Michigan Policies*, MICHIGAN.GOV, <http://www.michigan.gov/som/0,4669,7-192--281460--,00.html> (last visited February 14, 2017).

²⁵ Glassmeyer, *supra* note 6, at 9.

impossible to determine simply indicates that this barrier to access is less relevant in the context of administrative justice.

BARRIER #2: FILE FORMAT

The second element considered in the census is the format made available for individual decisions. Some formats impose limitations on direct users. For instance, PDF files are heavy to download, difficult to search effectively (a CTL-F—or Command F on Mac—in a PDF file will return only exact matches for every character, sorted in the document order), and make it difficult to copy and paste content into other applications or share on social media. Because the PDF format locks content and formatting together, it also makes it difficult for wholesale providers to extract content and reuse it in other databases. Tiff files are even worse since embedded text is not even recognized.

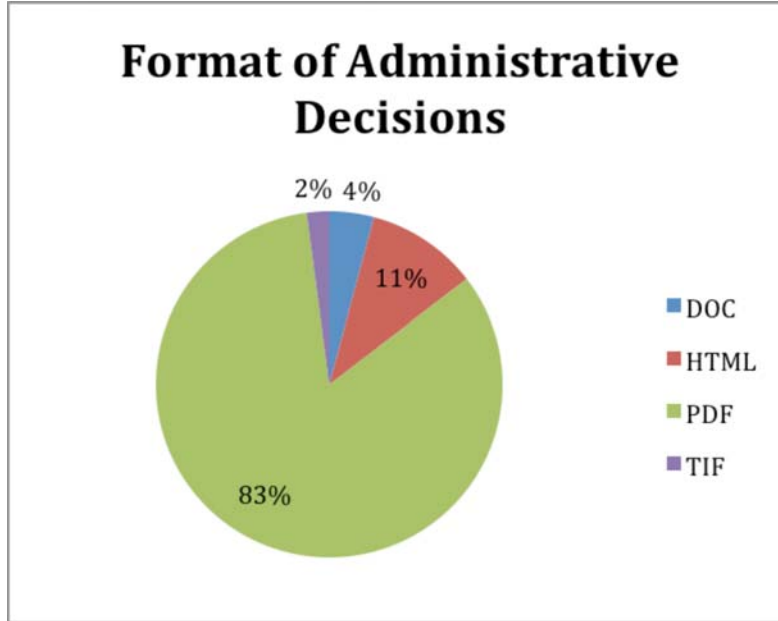
In contrast, some text-based formats are more open. HTML, for instance, is the standard for publishing on the Internet and facilitates the integration of content with other applications. Decisions posted in HTML are quick to download and easy to search and reuse.

Finally, some file formats are a mixed blessing. For instance, the Word file format (DOCX), over which Microsoft has proprietary rights, is generally welcomed by wholesale providers that can use Microsoft Office to efficiently export files to the HTML format. However, the license fee involved is a major barrier for direct users, among whom many are not already clients of Microsoft.

The census shows that only 11% (five out of forty-eight) of websites publishing administrative decisions online use the HTML format. Two agencies have opted to post the files in their original Microsoft Word format: the Arizona Office of Administrative Hearings and the Maine Board of Tax Appeals.²⁶ The State of Missouri Administrative Hearing Commission uses a product provided by Thomson West and is the only decision-maker to publish

²⁶ *Decision Search*, ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS, <https://portal.azoah.com/search1400/> (last visited Feb. 14, 2017); *Decisions*, MAINE.GOV DEPARTMENT OF ADMINISTRATIVE & FINANCIAL SERVICES BOARD OF TAX APPEALS, <http://www.maine.gov/boardoftaxappeals/decisions/index.html> (last visited Feb. 14, 2017).

using Tiff files.²⁷ All other agencies (forty out of forty-eight) post decisions in PDF.



These results can be explained by the fact that it requires very little effort for agencies to save original decisions in PDF from most word processing software and subsequently upload them to a web server. However, this practice creates concrete access limitations to both direct users and wholesale providers. Solutions automating the production of HTML pages from word processing files appear to be generally ignored by state agencies publishing administrative decisions, even though they are generally available on the market.

In 2015, Glassmeyer obtained almost identical results when accessing the online format of judicial opinions: 85% of courts websites make them available in PDF. This barrier thus affects access to administrative decisions and case law equally.²⁸

²⁷ *ProLaw Portal*, STATE OF MISSOURI ADMINISTRATIVE HEARING COMMISSION, <https://ahcportal.mo.gov> (last visited Feb. 9 2017).

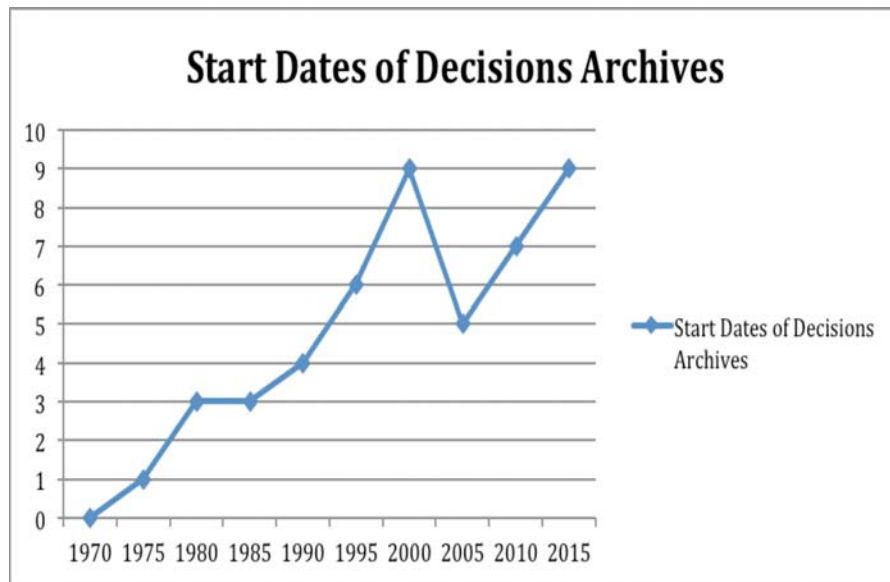
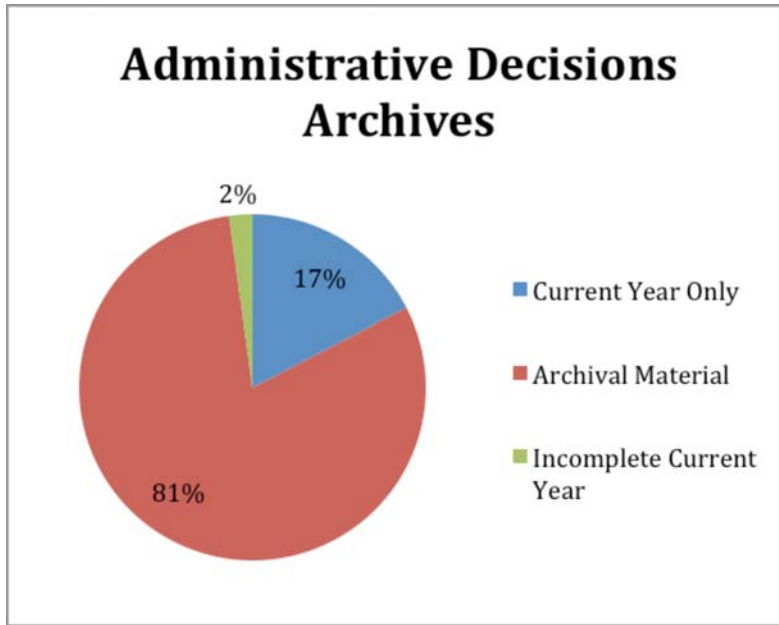
²⁸ Glassmeyer, *supra* note 6, at 9.

BARRIER #3: ABSENCE OF ARCHIVES

The scope of historical material made available strongly affects the quality of legal research that can be completed on any given website. Even the largest agencies do not render decisions on every possible subject every year, and it is only with the benefit of having access to several years of archives that users can truly expect to identify patterns in the decisions of ALJ. While the production of administrative decisions began to increase in the 1960s, it should be noted that electronic files ready for online publishing are generally available starting from the mid-1990's only. Agencies aiming to make older material available often have to invest in digitization, greatly increasing their costs. Although they improve access to administrative decisions, these initiatives may not be of paramount importance when we consider that the value of judicial decisions depreciates greatly, on average, after fifteen to twenty-five years.²⁹ Considering the rapid evolution of administrative law, administrative appeals can only be expected to become obsolete in a shorter time frame.

The data collected indicates that 81% (thirty-seven out of forty-eight) of websites providing access to administrative decisions include some form of archives going beyond the current year. This said, the depth of those archives varies greatly. The State of Florida Division of Administrative Hearings provides the broadest collection, with coverage beginning in 1976. In contrast, 33% (sixteen out of forty-eight) of them do not host any decision older than 2010. The median date of availability of archive is 2001, with only eleven websites reaching beyond the mid-1990 range.

²⁹ Ryan C. Black and James F. Spriggs, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 342 (2013); Thom Neale, *Citation Analysis of Canadian Case Law*, (2013) 1 J. OPEN ACCESS L. 1, 1 (2013), <https://ojs.law.cornell.edu/index.php/joal/article/view/20>.



In comparison, the State Legal Information Census completed by Glassmeyer in 2015 showed that 91% of court websites provide access to archives of case law, and that on average material is

available starting from 1997.³⁰ This indicates that access to archives of administrative decisions is substantially limited in comparison with case law: 10% more websites provide no archives, and when they do, coverage is amputated by five years on average.

The census also revealed that online archives of administrative decisions are not systematically exhaustive. The confidential nature of many administrative appeals implies that parties' personal information sometime needs to be removed from the bodies of decisions before being made available to the public. Agencies respond to this situation in various ways: some systematically redact decisions including personal information, others redact only a selection of decisions deemed more important, and finally others do not redact at all and instead opt not to provide access to such decisions. In the last two cases, some decisions are necessarily absent from the online archives, and the percentage missing varies depending on the field of practice involved. While redaction is also required for some judicial opinions, the barrier it poses on access is more acute in the administrative sector simply because of the sheer volume of decisions affected.

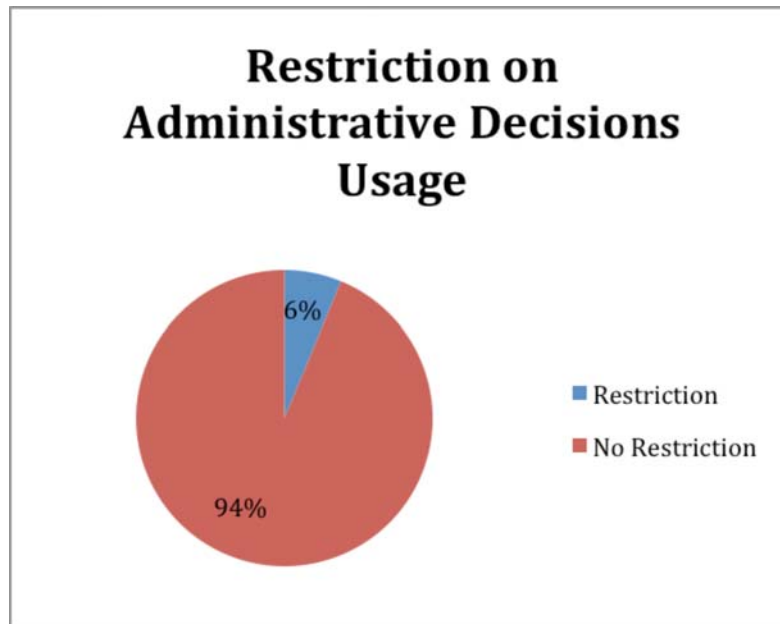
BARRIER #4: REUSE RESTRICTIONS

The next barrier to be assessed relates to the imposition of restrictions on the reuse of decisions by website users. We have become accustomed to commercial websites imposing restrictive terms of use on content, and some states use the same technique to limit potential abuse. When imposed on administrative decisions, however, it amounts to controlling how the law can be used.

It appears that the vast majority of state agencies, that is, 94% (forty-five out of forty-eight), do not impose any reuse restrictions on ALJ opinions. Exceptions to this rule can be found in only two states. The first one is Indiana, where the official government website includes a blanket clause stating that its content can be used only "by you for your own personal use, and not for republication, distribution, assignment, sublicense, sale, preparation of derivative

³⁰ Glassmeyer, *supra* note 6.

works or other use.”³¹ Such a clause effectively blocks wholesale providers from incorporating administrative decisions in other databases, whether on a commercial basis or not. The second is Missouri, where the Administrative Hearing Commission imposes the inclusion of a disclaimer with any reproduction of the material.³²



It can be concluded that, with very few exceptions, this barrier generally does not pose a problem when it comes to accessing administrative decisions online. Again, this is consistent with Glassmeyer’s findings, which were that 92% of court websites do not impose reuse restrictions on case law.³³

BARRIER #5: COPYRIGHT CLAIMS

Many states include copyright claims on portions of their websites that host administrative decisions. In most cases, those

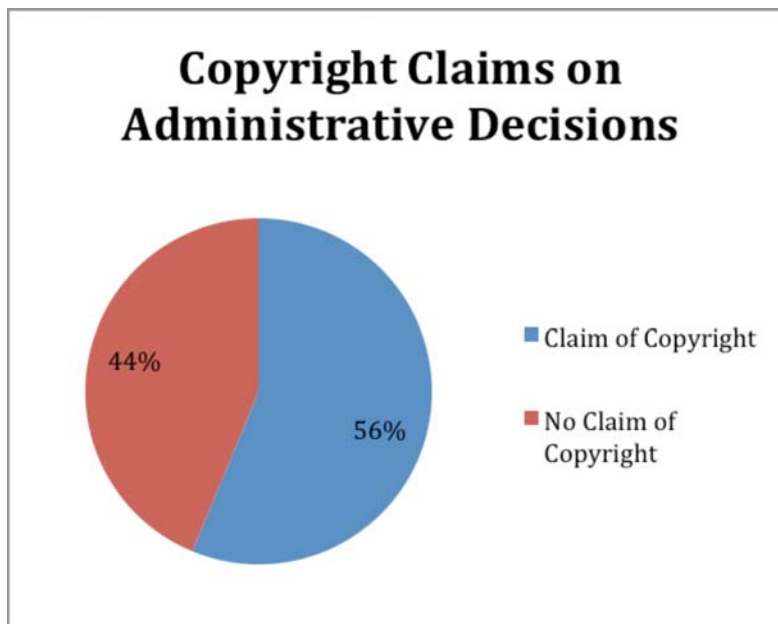
³¹ *Terms of Use Agreement*, INDIANA GOVERNMENT, https://www.in.gov/core/terms_of_use.html (last visited Feb. 9, 2017).

³² *Data Policy*, MO.GOV OFFICIAL MISSOURI STATE WEBSITE, <http://www.mo.gov/data-policy/>, (last visited Feb. 9, 2017).

³³ Glassmeyer, *supra* note 6, at 17.

claims are incorporated via the generic footer of the website and are probably put there to protect other types of information, such as images and logos. It remains that they also affect any legal information included on the same page. If the application of those claims to administrative decisions is uncertain, they definitely create doubts regarding the rights of users to reproduce the opinions in the context of legitimate uses. This is sufficient to reduce usage of the material provided in itself.

In total, 56% (twenty-seven out of forty-eight) of agencies' websites include a copyright claim affecting the administrative decisions they publish. Some websites, such as the New Jersey Office of Administrative Law website, simply display copyright notices.³⁴ Others also contain statements implying that administrative decisions may be copyrighted. For instance, the Michigan Administrative Hearing System website specifies "All content on Michigan.gov is the property of the State or its content suppliers and is protected by intellectual property laws."³⁵



³⁴ *OAL Final Decisions*, NEW JERSEY OFFICE OF ADMINISTRATIVE LAW, <http://www.state.nj.us/oal/decisions/final/index.html>. (last visited Feb. 9, 2017).

³⁵ See *supra* note 23.

The percentage of state agencies claiming copyright on administrative decisions is significantly higher than the percentage of courts claiming copyright on judicial opinions, which was found to be 43% by Glassmeyer in 2015. The difference may originate from a lack of awareness of the webmasters operating state websites, in comparison with judicial institutions.

BARRIER #6: THIRD PARTY PUBLISHING

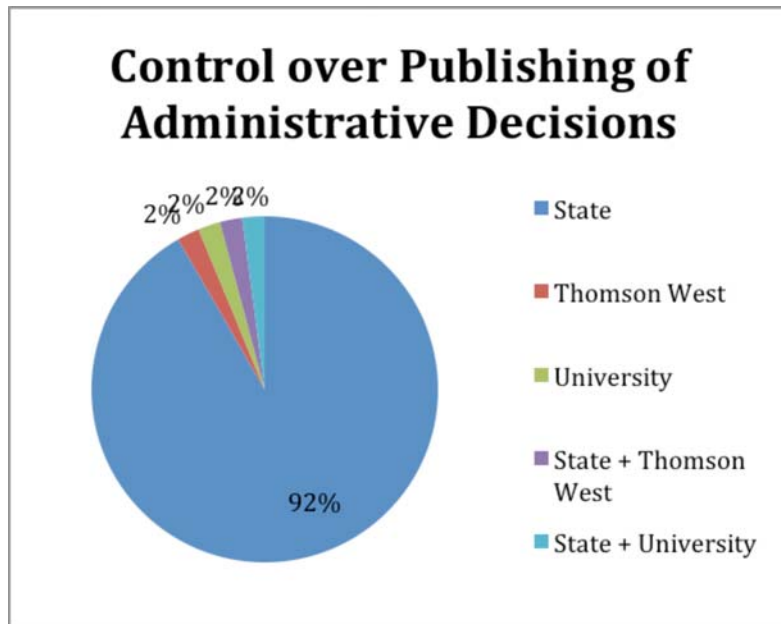
The level of access to legal information is also impacted by who publishes it. While, by default, states have full control over the online availability of their administrative decisions, they sometimes delegate this function to other entities. Some of these third parties operate on a commercial basis, such as legal publishers, and others on a non-profit basis, such as universities. These players introduce their own limitations on access. Fees charged by commercial publishers are the most evident example. Another type of limitation comes from the added value that those third parties often incorporate into the raw documents, making it difficult for users to separate public legal material from proprietary data (headnotes and paragraph numbering for instance). They also typically insert additional terms of use on top of those potentially already imposed by the State.

The census demonstrates that among state agencies providing online access to administrative decisions, 92% (forty-four out of forty-eight) have retained control over the publishing process. Two have chosen to collaborate with Thomson West on this matter.³⁶ Another two have instead opted to delegate control to local state universities.³⁷ Both collaboration scenarios are split between cases of

³⁶ *Indiana Register*, INDIANA GENERAL ASSEMBLY, <http://www.in.gov/legislative/register/irtoc.htm> (need date last visited the website); *Office of Administrative Hearings—Decisions*, NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS, <http://www.ncoah.com/hearings/decisions/> (last visited May 12, 2017).

³⁷ *New Jersey Administrative Reports*, THE NEW JERSEY DIGITAL LEGAL LIBRARY, <http://njlegallib.rutgers.edu/njar/njarhome.htm> (last visited May 12, 2017); *Tennessee Department of State, Opinions from the Administrative Procedures Division*, UNIVERSITY OF TENNESSEE KNOXVILLE, http://trace.tennessee.edu/utk_lawopinions/ (last visited May 12, 2017).

complete outsourcing and cases of joint publishing under which the state continues to publish recent opinions.



On this aspect, the proportion of websites controlled by states is identical between the State Administrative Decisions Census and the State Legal Information Census of 2015 (92%). Distinctions appear between the remaining 8% that is systematically under the responsibility of the two major legal publishers (LexisNexis and Westlaw) for case law. The universities' involvement is specific to the publishing of administrative decisions.

One major discrepancy between these two sets of data results from proportions based on the number of websites actually providing access to decisions. While all official court websites provide one form or another of access to case law, half of agency websites surveyed do not even provide access to appellate decisions (forty-eight out of ninety-six). Overall, no administrative decision was located online for sixteen states. While most of those agencies stay silent on the question, some specifically point to the major legal publishers as the only way of accessing decisions. In a sense, this situation can be considered as an abdication by the state of its control over the dissemination of ALJ opinions in favor of the legal publishers. If those agencies were to be taken into consideration in

the graph above, the proportion of those asserting control over the publishing of administrative decisions would fall to 47% (forty-four out of ninety-six).

BARRIER #7: DISCLAIMER ABOUT CORRECTNESS

It is one thing to make administrative decisions available online; it is still necessary to achieve it in a way that entices users to trust the information. By adjoining disclaimers casting doubts about the accuracy of the documents made available online, some states lead users to refrain from using them and to look instead for alternative sources that may prove to be more trustworthy.

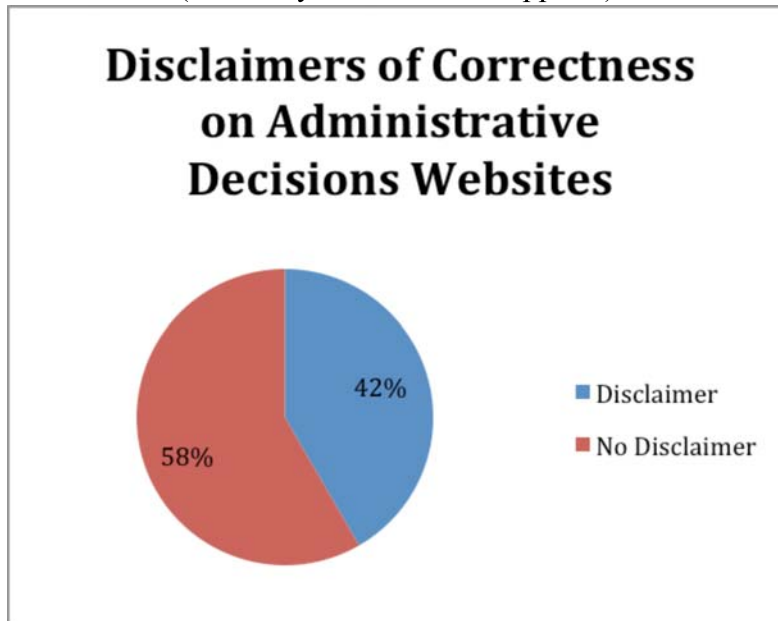
Such disclaimers about the correctness of the information provided can be found on 42% (twenty out of forty-eight) of the agency websites surveyed. They take different forms with the common denominator of attempting to warrant any form of guarantee that could potentially involve the state liability:

- “[T]he agency does not warrant the accuracy, reliability or timeliness of information published on this website.” (Minnesota Office of Administrative Hearings)³⁸
- “No warranty expressed or implied is made regarding: accuracy, adequacy, completeness, legality, reliability, merchantability, fitness for a particular purpose, freedom from contamination by computer viruses, or usefulness of any information.” (California Office of Administrative Hearings)³⁹
- “While all attempts are made to insure the correctness and suitability of information under our control and to correct any errors brought to our attention, no representation or guarantee can be made as to the correctness or suitability of that information or any linked information presented, referenced,

³⁸ *Website Disclaimer*, MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS, <https://mn.gov/oah/about-us/website-disclaimer.jsp> (last visited May 12, 2017).

³⁹ *Disclaimer*, CALIFORNIA DEPARTMENT OF GENERAL SERVICES, <http://www.dgs.ca.gov/Disclaimer.html> (last visited May 12, 2017).

or implied. All critical information should be independently verified.” (Kentucky Board of Tax Appeals)⁴⁰



These numbers are again consistent with the findings of the 2015 State Legal Information Census regarding case law, in which 43% of court websites include similar disclaimers.⁴¹ It can only be hoped that these disclaimers are added solely for legal protection and are not representative of the actual quality of the legal information made available online by the states.

BARRIER #8: ABSENCE OF FULL-TEXT SEARCH

The final barrier assessed over the course of the Census addresses the availability of a search engine enabling users to search the content of administrative decisions. While wholesale providers may be content with lists of opinions for download, direct users need a way to locate the few documents that are relevant to them. Search by field is convenient for certain uses, but does not provide the

⁴⁰ *External Link Disclaimer Statement*, KENTUCKY.GOV, <http://kentucky.gov/policies/Pages/disclaimer.aspx> (last visited May 12, 2017).

⁴¹ Glassmeyer, *supra* note 6.

flexibility of locating any keyword in the decision body. Without full-text search, online access cannot be considered truly meaningful.

While 79% (thirty-eight out of forty-eight) of agency websites providing online access to administrative decisions integrate some form or another of full text search, the quality of those tools varies greatly. Websites providing a search device dedicated to legal research are few. Instead, most simply index appellate decisions with the generic website search, agglomerating legal material with all other types of information made available on the Internet. The remaining 21% (ten out of forty-eight) of websites do not provide any full-text search mechanism at all. Some websites were also found to voluntarily restrict access to administrative decisions using fielded search. For instance, the Georgia Office of State Administrative Hearings limits access to the parties involved by requiring the decision's docket number and the petitioner's zip code to be inputted before granting access.⁴²



⁴² *Court Decisions*, GEORGIA OFFICE OF STATE ADMINISTRATIVE HEARINGS, <http://www.osah.ga.gov/get-decision.php> (May 12, 2017).

In comparison, the Glassmeyer State legal Information Census of 2015 showed that only 16% of court websites lack that feature.⁴³ The same difference in the quality of available search engines was also noted. Here again, the results between both census are consistent, with the barrier being slightly more present in the case of administrative decisions.⁴⁴

STATE RANKINGS

The census provided an opportunity to compare states' online publishing practices regarding administrative decisions. In order to allow comparisons with the Glassmeyer census of 2015, the same scoring methodology was replicated. For each website reviewed, one point was accorded if each of the following practices could be identified:

- The online version of decisions is official
- Decisions are provided in an open file format
- Archives are available in some form
- No restrictions are attached to reuse
- The state does not claim a copyright on the decisions
- The state publishes by itself
- There are no disclaimers about the correctness of the data
- Full-text search in the body of decisions is available

This resulted in the attribution of a score zero to eight for each website: zero represents the absence of online access, and eight the provision of barrier-free access. In states where a central panel is in place, the score of that central panel is used as the state score. In states where three agencies websites were assessed, the average score of those three agencies is used as the state score. Details of the scoring of individual websites are saved in the spreadsheet included at Appendix II–State-by-State Scoring.⁴⁵

The average state score is 2.45 out of 8. No state provides barrier-free access to administrative decisions. Arizona and Texas achieved the best scores, with seven out of eight. Sixteen states not providing any online access to administrative decisions on the websites

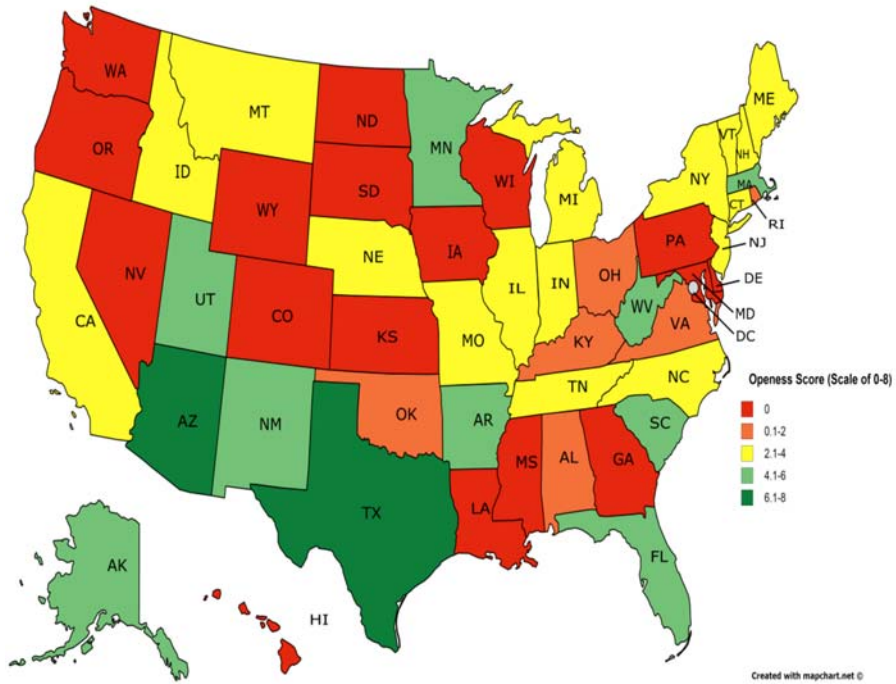
⁴³ GLASSMEYER, *supra* note 6.

⁴⁴ *Id.*

⁴⁵ See *Infra* Appendix II.

surveyed received the worst score. Every one of those states share a score of zero out of eight.

The following map illustrates the level of access to administrative decisions across the United States:



State	Total score
Alabama	2
Alaska	6
Arizona	7
Arkansas	4.33
California	3
Colorado	0
Connecticut	4
Delaware	0
Florida	6
Georgia	0
Hawaii	0
Idaho	3.33
Illinois	2.67

Indiana	2.33
Iowa	0
Kansas	0
Kentucky	1
Louisiana	0
Maine	2.33
Maryland	0
Massachusetts	5
Michigan	4
Minnesota	5
Mississippi	0
Missouri	3
Montana	4
Nebraska	2.33
Nevada	0
New Hampshire	3
New Jersey	3
New Mexico	5.67
New York	3.33
North Carolina	3
North Dakota	0
Ohio	2
Oklahoma	2
Oregon	0
Pennsylvania	0
Rhode Island	1.67
South Carolina	5
South Dakota	0
Tennessee	4
Texas	7
Utah	5
Vermont	3.33
Virginia	2
Washington	0
West Virginia	5
Wisconsin	0
Wyoming	0

APPENDIX I – CENSUS DATA

State	Central Panel / Agency Name	URL of Agency	Online Official or Unofficial	Format	Publisher of Online	Keyword search available ?	Recent Only or Archives?	Scope of Archives	Bulk Download Available?	Use Restrictions?	Website Copyright Notice ?	Notes
Alabama	Alabama department of Labor - Hearings and Appeals	https://labor.alabama.gov/contacts/Hearings_Appeals.aspx	N/A									
Alabama	Alabama Department of Revenue - Motor Vehicle Division	http://revenue.alabama.gov/motorvehicle/	N/A									
Alabama	Alabama Tax Tribunal	http://taxtribunal.alabama.gov/	Unknown	PDF	State	Yes	Archives	1983	No	No	No	
Alaska	Alaska Office of Administrative Hearings	http://doa.alaska.gov/oa/	Official	PDF	State	Yes	Archives	2008	No	No	Yes	Website search only.
Arizona	Arizona Office of Administrative Hearings	http://www.azoah.com/	Official	DOC	State	Yes	Archives	1997	No	No	Yes	
Arkansas	Arkansas Workers' Compensation Commission	http://www.awcc.state.ar.us/ajj.html	Unknown	PDF	State	No	Archives	2003	No	No	No	
Arkansas	Arkansas Motor Vehicle Commission	http://amvc.arkansas.gov/Commissioners.html	Official	PDF	State	No	Archives	2004	No	No	Yes	
Arkansas	Arkansas Department of Finance and Administration - Office of Hearings & Appeals	http://www.dfa.arkansas.gov/offices/policyAndLegal/Pages/HearingsAppeals.aspx	Official	PDF	State	Yes	Recent only	2016	No	No	Yes	
California	California Office of Administrative Hearings	http://www.des.ca.gov/oha/Home.aspx	Unofficial	PDF	State	Yes	Recent only		No	No	Yes	Two types of decisions on distinct webpages.
Colorado	Colorado Office of Administrative Courts	https://www.colorado.gov/oa	N/A									
Connecticut	State of Connecticut Workers' Compensation Commission	http://wcc.state.ct.us	Official	HTML	State	Yes	Archives	1993	No	No	No	
Connecticut	Connecticut Department of Motor Vehicle	http://www.ct.gov/dmv/site/default.asp	N/A									
Connecticut	Connecticut Department of Revenue services	http://www.ct.gov/ds/site/default.asp	Unofficial	HTML	State	Yes	Archives	1989	No	No	Yes	Website search only.
Delaware	State of Delaware - Department of Labor - Division of Industrial Affairs - Office of Workers' Compensation	https://dia.delawareworks.com/workers-comp/	N/A									
Delaware	State of Delaware - Division of Motor Vehicle	http://dmv.de.gov/index.shtml	N/A									
Delaware	Delaware State Tax Appeal Board	http://finance.delaware.gov/publications/tab_rules/tab_rules_actions.shtml	N/A									
Florida	State of Florida Division of Administrative Hearings	https://www.doah.state.fl.us/AJL/	Unknown	PDF	State	Yes	Archives	1976	No	No	No	

Maine	Maine Workers' Compensation Board	http://www.maine.gov/web/	Unofficial	PDF	State	Yes	Recent only	2013	No	No	Yes	
Maine	Maine Bureau of Motor Vehicles	http://www.maine.gov/sos/bmv/index.html	N/A									
Maine	Maine Board of Tax Appeals	http://www.maine.gov/bear/doftaxappeals/index.html	Unofficial	DOC	State	No	Archives	2012	No	No	Yes	Website search does not index individual decisions.
Maryland	Maryland Office of Administrative Hearings	http://www.oah.state.md.us	N/A									
Massachusetts	Division of Administrative Law Appeals	http://www.mass.gov/amf/hearings-and-appeals/oversight-agencies/dlaa/	Unofficial	PDF	State	Yes	Archives	2007	No	No		For example, all judicial opinions and all laws and regulations are public record. Website search only.
Michigan	Michigan Administrative Hearing System	http://www.michigan.gov/lara/0,4601,7-154-10576-.../0.html	Unofficial	PDF	State	Yes	Archives	1998	No	No		All content on Michigan.gov is the property of the State or its content suppliers and is protected by intellectual property laws.
Minnesota	Minnesota Office of Administrative Hearings	https://mn.gov/oah/	Unofficial	PDF	State	Yes	Archives	1983	No	No	No	
Mississippi	Mississippi Workers' Compensation Commission	http://www.mwcc.state.ms.us/	N/A									
Mississippi	Mississippi Department of Revenue	http://www.dor.ms.gov	N/A									
Mississippi	Mississippi Board of Tax Appeals	http://www.bta.ms.gov	N/A									
Missouri	State of Missouri Administrative Hearing Commission	http://ahc.mo.gov	Unofficial	TIF	State	No	Archives	1999	No	Requires to include a disclaimer.	No	Two distinct databases, pre and post February 2016.
Montana	Montana Department of Labor and Industry	http://dli.mt.gov	Official	PDF	State	Yes	Archives	2001	No	No	No	Website search only.
Montana	Montana Department of Justice: Motor Vehicle Division	https://dojmt.gov/driving/	N/A									
Montana	Montana Tax Appeal Board	http://mtab.mt.gov	Unofficial	PDF	State	Yes	Archives	1998	No	No	No	Website search only.
Nebraska	Nebraska Workers' Compensation Court	http://www.wcc.ne.gov	N/A									Site down at time of survey.
Nebraska	Nebraska Department of Motor Vehicle	http://www.dmv.nebraska.gov	N/A									
Nebraska	Nebraska Department of Revenue	http://www.revenue.nebraska.gov	Official	PDF	State	Yes	Archives	2000	No	No	No	Website search only.

Oklahoma	Oklahoma Tax Commission	https://www.ok.gov/tax/	Official	PDF	State	Yes	Archives	1989	No	No	Yes	Website search only.
Oregon	State of Oregon Office of Administrative Hearings	http://www.oregon.gov/OAH/Pages/index.aspx	N/A									
Pennsylvania	Pennsylvania Workers Compensation Appeals Board	http://www.dli.pa.gov/Businesses/Compensation/appeals/Pages/default.aspx	N/A									
Pennsylvania	Pennsylvania department of Transportation	http://www.dmv.pa.gov/	N/A									
Pennsylvania	Pennsylvania Department of Revenue: Board of Appeals	https://www.boardofappeals.state.pa.us	N/A									
Rhode Island	Rhode Island Workers' Compensation Court	https://www.courts.ri.gov/Courts/workerscompensationcourt/Pages/default.aspx	N/A									
Rhode Island	State of Rhode Island Division of Motor Vehicles: Adjudication Office	http://www.dmv.ri.gov/adjudication/	N/A									
Rhode Island	State of Rhode Island Department of Revenue: Division of Taxation	http://www.tax.ri.gov	Unknow	PDF	State	No	Archives	2011	No	No	No	
South Carolina	South Carolina Administrative law Court	http://www.scale.net	Official	PDF	State	Yes	Archives	1994	No	No	Yes	
South Dakota	South Dakota Bureau of Administration	https://bos.sd.gov/divisions/hearing/	N/A									
Tennessee	Tennessee Administrative Procedures Division	http://sos.tn.gov/apd	Unofficial	PDF	University of Tennessee	Yes	Archives	2005	No	No	No	
Texas	State Office of Administrative Hearings	http://www.ssoah.texas.gov	Official	PDF	State	Yes	Archives	2010	No	No	No	
Utah	Utah Labor Commission: Industrial Accidents Division	http://laborcommission.utah.gov/divisions/IndustrialAccidents/index.html	Official	PDF	State	Yes	Archives	1995	No	No	No	
Utah	Utah state Tax Commission: Division of Motor Vehicles	http://dmv.utah.gov	Unofficial	PDF	State	Yes	Archives	1988	No		Yes	
Utah	Utah state Tax Commission: Division of Motor Vehicles	http://dmv.utah.gov	Unofficial	PDF	State	Yes	Archives	1988	No		Yes	
Vermont	Vermont Department of Labor	http://labor.vermont.gov/workers-compensation/	Unknow	PDF	State	Yes	Archives	1995	No	No	Yes	Website search only.
Vermont	Vermont Department of Motor Vehicles	http://dmv.vermont.gov	N/A									
Vermont	Vermont Department of Taxes	http://tax.vermont.gov	Unknow	PDF	State	Yes	Archives	1999	No	No	Yes	Website search only.

