



## Protected Materials in Public Rulemaking Dockets

### Committee on Rulemaking

#### Proposed Recommendation for Committee | August 4, 2020

1           The Administrative Conference has issued several recommendations to help agencies  
2 balance the competing considerations of transparency and confidentiality in managing their  
3 rulemaking dockets.<sup>1</sup> This project builds on these recommendations. It provides greater  
4 specificity to agencies on how they should handle rulemaking materials they determine should be  
5 withheld to protect sensitive business or personal information, notwithstanding any  
6 countervailing benefits of disclosure (hereinafter “protected material”).

7           As part of the rulemaking process, an agency creates a public rulemaking docket, which  
8 consists of all rulemaking materials the agency has: (1) publicly disclosed under the Freedom of  
9 Information Act (FOIA); (2) proactively published online; or (3) made available for public  
10 inspection in a reading room. Public rulemaking dockets include materials agencies generate  
11 themselves and comments agencies receive from the public. Broadly speaking, public  
12 rulemaking dockets serve three purposes: providing the public with the information the agency  
13 considered in a rulemaking, providing courts with a record for evaluating challenges to the rule,  
14 and satisfying agency recordkeeping requirements.

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<sup>1</sup> For example, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, the *Administrative Record in Informal Rulemaking*, advises agencies to develop guidance on managing and segregating protected information, such as commercial information and sensitive personal information, while disclosing non-protected materials. Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶11, 78 Fed. Reg. 41,358, 41,361 (July 10, 2013).



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15           Currently, agencies accept public comments for their public rulemaking dockets through  
16 Regulations.gov and their own websites. Regulations.gov and agency websites that accept  
17 comments expressly notify the public that the agency may publish the information it receives.<sup>2</sup>  
18 When a person submits a comment to an agency, however, the agency does not immediately  
19 publish the comment. Instead, agencies take time to review comments before publishing them.  
20 Most agencies perform at least some kind of screening during this period.

21           Agencies perform this screening because, in maintaining their public rulemaking dockets,  
22 they confront competing considerations of transparency and confidentiality. On the transparency  
23 side, FOIA presumes disclosure of information requested by a member of the public, subject to  
24 certain exceptions described below. And the *Portland Cement* doctrine requires agencies to make  
25 publicly available the critical information — including technical studies, staff reports, data, and  
26 methodologies — underlying proposed rules.<sup>3</sup>

27           But agencies often receive materials during rulemaking for which the law authorizes  
28 withholding because of their content. For example, one of FOIA’s exemptions, called  
29 “Exemption 6,” covers “personnel and medical files and other similar files the disclosure of  
30 which would constitute an unwarranted invasion of privacy.”<sup>4</sup> “Similar files” means any  
31 information about a person, such as a name, address, or occupation, that can be used to identify  
32 the person.<sup>5</sup> In deciding whether Exemption 6 applies, courts determine whether disclosure  
33 would constitute a “clearly unwarranted invasion of personal privacy.”<sup>6</sup> In making this  
34 determination, they balance the privacy interests of the person to whom the information pertains  
35 against society’s interest in learning about governmental processes. Privacy interests are greatest

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<sup>2</sup> See Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets>.

<sup>3</sup> See *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>4</sup> 5 U.S.C. § 552(b)(6).

<sup>5</sup> See *Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014).

<sup>6</sup> See *Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 361 (5th Cir. 2001).



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36 when the projected harm from disclosure of the information includes identity theft and fraud.<sup>7</sup>  
37 Privacy interests are minimal when a person has consented to the agency disclosing his or her  
38 information. If an agency encounters information that falls under Exemption 6, FOIA authorizes  
39 the agency to exclude it from the public rulemaking docket.

40 Another FOIA exemption, called “Exemption 4,” covers “trade secrets and commercial  
41 or financial information obtained from an individual and confidential.”<sup>8</sup> Information is  
42 “confidential” within the meaning of Exemption 4 if it is “customarily . . . kept private or closely  
43 held by the submitter” and the government has given some assurance to the submitter, either  
44 explicitly or implicitly, that the information will not be publicly disclosed.<sup>9</sup> An agency can assure  
45 a submitter that commercial information will not be publicly disclosed by, for example, directly  
46 communicating to the submitter an intent to not disclose his or her commercial information,  
47 posting a general notice informing submitters that their commercial information will not be  
48 disclosed, or engaging in an established practice of not disclosing commercial information.<sup>10</sup>  
49 FOIA authorizes agencies to exclude from their public rulemaking dockets information falling  
50 under Exemption 4.

51 There are three categories of material that, according to the research underlying this  
52 Recommendation, agencies generally consider to be “protected materials.”<sup>11</sup> The first is unique  
53 identification numbers, either of submitters themselves or of third parties, that create a high risk  
54 of identity theft if disclosed. This category includes social security numbers, bank account  
55 numbers, and passport numbers. The second category consists of two kinds of information:  
56 information about the submitter submitted to the agency accidentally, and information pertaining

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<sup>7</sup> See *id.* at 559.

<sup>8</sup> 5 U.S.C. § 552(b)(4).

<sup>9</sup> See *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361 (2019).

<sup>10</sup> See OFFICE OF INFORMATION POLICY, DEP’T OF JUSTICE, EXCEPTION 4 AFTER THE SUPREME COURT’S RULING IN *FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA* (Oct. 4, 2019), <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>.

<sup>11</sup> See Yoo, *supra* note 2, at 104, 124–26.



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57 to someone other than the submitter. Information within this category includes names, email  
58 addresses, physical addresses, medical information, and so on. The final category consists of  
59 commercial information provided to the agency under an assurance of privacy. Courts have  
60 generally authorized agencies to withhold materials in all three of these categories under FOIA  
61 Exemptions 4 and 6.<sup>12</sup>

62 This Recommendation prescribes steps agencies can take to exclude from their public  
63 rulemaking dockets protected material while still providing the public with the information upon  
64 which the agency relied in formulating the proposed rule. The Recommendation also identifies  
65 resources that can help agencies implement this principle.

### RECOMMENDATION

#### Screening and Scrubbing Comments

- 66 1. Agencies should decide which classes of rulemaking materials should be withheld to  
67 protect sensitive business or personal information, notwithstanding any countervailing  
68 public benefits of disclosure (hereinafter “protected material”). In making this decision,  
69 agencies should be aware that other agencies generally deem the following classes of  
70 material to be protected material:
- 71 a. Unique identification numbers including social security numbers, bank account  
72 numbers, and passport numbers;
  - 73 b. Names, email addresses, physical addresses, incomes, medical information, and  
74 other kinds of personal information inadvertently submitted by the commenter or  
75 that pertain to third parties; and
  - 76 c. Commercial information provided to the agency under an assurance of privacy.

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<sup>12</sup> See, e.g., *Taitz v. Astrue*, 806 F. Supp. 2d 214, 220 (D.D.C. 2011) (authorizing, under Exemption 6, withholding of social security numbers); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (authorizing, under Exemption 6, withholding of information pertaining to third parties); *Food Marketing Inst.*, 139 S. Ct. at 2361 (authorizing, under Exemption 4, withholding of commercial information provided to the agency under an assurance of privacy).



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- 77 2. Agencies should screen comments for protected material. If, when screening, an agency  
78 determines that a comment contains:
- 79 a. *Isolated instances of protected material*, the agency should redact that material  
80 and publish the rest of the comment. Redaction should be thorough enough to  
81 prevent a person from discerning the redacted information, but not so broad as to  
82 prevent the public from viewing non-protected material;
- 83 b. *Protected material pertaining to a large number of people*, the agency should  
84 aggregate such data and only publish the aggregated data. Agencies should work  
85 with data science experts and others in relevant disciplines to ensure that  
86 aggregation is thorough enough to prevent someone from disaggregating the data  
87 (i.e., linking the aggregated data with any person).
- 88 3. If redaction and aggregation would still permit a member of the public to identify the  
89 redacted material, or disaggregate the aggregated material, the agency should withhold  
90 the comment in its entirety.
- 91 4. Agencies should explore using a variety of computer-based tools to aid in their  
92 identification of protected material. This exploration should include speaking with private  
93 sector experts and technology-focused agencies such as the General Services  
94 Administration's Technology Transformation Service and the Office of Management and  
95 Budget's United States Digital Service to determine which tools are most appropriate and  
96 how they can be best deployed given the agencies' resources.

### **Deciding Whether To Offer Assurances of Privacy For Commercial Information**

- 97 5. Agencies should recognize that there may be instances in which businesses want to  
98 submit commercial information, such as trade secrets, to inform the agencies' rulemaking  
99 efforts, but do not want such information to be made publicly available. Agencies should  
100 decide whether they will offer assurances of privacy for commercial information. Factors  
101 that weigh in favor of offering assurances of privacy include:
- 102 a. The agency has the resources to identify and withhold commercial  
103 information;



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- 104                   b. The agency receives a high volume of requests for private treatment of  
105                   commercial information;
- 106                   c. The agency’s rulemaking efforts can benefit from the agency’s review of  
107                   commercial information; and
- 108                   d. The agency can identify no substitute for commercial information that would  
109                   inform its rulemaking in a comparable manner.
- 110           6. Agencies that choose to offer assurances of privacy for commercial information should  
111           decide how they will offer them. Agencies can choose to inform submitters, directly upon  
112           submission, that they will accord commercial information private treatment; post a  
113           general notice informing submitters that commercial information will be accorded private  
114           treatment; or both.
- 115           7. Agencies that choose to offer assurances of privacy for commercial information should  
116           adopt policies to help them identify it. Agencies should consider including the following,  
117           either in tandem or as alternatives, as part of their policies:
- 118                   a. Instructing submitters to write the word “Private,” “Protected,” or similar  
119                   language within the header of their submissions that contain commercial  
120                   information;
- 121                   b. Instructing submitters to flag the particular text within the comment that  
122                   constitutes commercial information; and
- 123                   c. Instructing submitters to submit both redacted and unredacted versions of a  
124                   comment that contains commercial information.
- 125           8. Agencies that choose to accord private treatment for commercial information should  
126           withhold such material, using the techniques described in Paragraph 2 as appropriate.

### **Allowing Submitters to Notify the Agency, Before the Agency Publishes the Comment, of Material They Inadvertently Submitted**

- 127           9. Agencies should give submitters an opportunity to alert relevant agency officials to any  
128           personal information they inadvertently included in their comments. To provide sufficient  
129           opportunity for people to notify the agency of inadvertently submitted personal



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130 information, agencies should delay publishing comments for a reasonable amount of time  
131 after they are received.

132 10. Agencies should ensure that the personal information submitters have identified as  
133 inadvertently submitted is not publicly disclosed.

### **Allowing People to Notify the Agency, After the Agency Publishes the Comment, of Personal and Commercial Information They Want Removed**

134 11. Agencies should allow people to request that personal or commercial information  
135 pertaining to themselves or a dependent within the comment be removed from public  
136 exposure. Agencies should review such requests and, upon determining that the  
137 information subject to the request is, in fact, personal or commercial information, they  
138 should take all steps necessary to so remove it.

### **Describing Material an Agency Has Withheld**

139 12. When agencies withhold from public disclosure personal or commercial information they  
140 have received from the public in connection with a rulemaking and on which they have  
141 relied in formulating rules, they should describe the withheld material in as much detail  
142 as possible without compromising its confidentiality. In doing so, agencies should  
143 consider preparing explanatory staff or technical reports and should publish these reports



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144 on the parts of their websites that describe their rulemaking processes and within the  
145 preambles to final rules.

### **Including Notifications for Members of the Public Before They Submit Comments or Otherwise Take Part in Rulemaking**

- 146 13. To reduce the risk that agencies will inadvertently disclose protected material in  
147 connection with rulemakings, agencies should clearly notify the public about their  
148 treatment of protected material. An agency's notifications should:
- 149 a. Inform members of the public that all comments submitted are subject to  
150 public disclosure;
  - 151 b. Instruct members of the public how they can submit comments anonymously,  
152 for example, by writing "Anonymous" in the name field on the online  
153 comment platform or by leaving the name field blank;
  - 154 c. Inform members of the public what weight, if any, the agency accords  
155 comments that are submitted anonymously;
  - 156 d. Inform members of the public whether the agency offers assurances of privacy  
157 for their commercial information and if so, how to identify such information  
158 for the agency;
  - 159 e. Instruct members of the public never to submit unique identification numbers  
160 such as social security numbers and other kinds of personal or commercial  
161 information that pertain to third parties, such as medical information and trade  
162 secrets;
  - 163 f. Advise members of the public to review their comments for the material  
164 identified above in e. and, if they find such material, to remove it;
  - 165 g. Inform members of the public that they may request, during the period  
166 between when a comment is received and when it is made public, that  
167 personal information they inadvertently submitted be withheld;
  - 168 h. Inform members of the public that they may request, after the agency has  
169 published any comment, that personal or commercial information pertaining





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170 to themselves or to their dependents within the comment be removed from  
171 public exposure; and  
172 i. Inform members of the public that the agency reserves the right to redact or  
173 aggregate any part of a comment if the agency determines that it constitutes  
174 protected material, or may withhold a comment in its entirety if it determines  
175 that redaction or aggregation would insufficiently prevent the disclosure of  
176 this information.

177 14. An agency should include the notifications described in Paragraph 13 in at least the  
178 following places:

- 179 a. Within the rulemaking document upon which the agency requests comments, such  
180 as a notice of proposed rulemaking or an advanced notice of proposed  
181 rulemaking;  
182 b. Within the online comment submission form on Regulations.gov, or, if the agency  
183 does not participate in Regulations.gov, on the agency's own comment  
184 submission form;  
185 c. Within any automatic emails that an agency sends acknowledging receipt of a  
186 comment;  
187 d. On any part of the agency's website that describes its rulemaking process; and  
188 e. Within any notices of public meetings pertaining to the rule.