



## Protected Materials in Public Rulemaking Dockets

### Committee on Rulemaking

#### Proposed Recommendation for Committee | November 18, 2020

**Commented [TR1]:** Note for the Committee: Other than the edits identified in the comments below, all other changes ACUS staff made to this document are purely stylistic.

1 As part of the rulemaking process, an agency creates a public rulemaking docket, which  
2 consists of all rulemaking materials the agency has: (1) proactively published online or (2) made  
3 available for public inspection in a reading room. Public rulemaking dockets include materials  
4 agencies generate themselves and comments agencies receive from the public. Their purpose is  
5 to provide the public with the information that informed the agency’s rulemaking.<sup>1</sup>

6 The Administrative Conference has issued several recommendations to help agencies  
7 balance the competing considerations of transparency and confidentiality in managing their  
8 public rulemaking dockets.<sup>2</sup> This project builds on these recommendations.

9 The scope of the Recommendation is limited to personal information and confidential  
10 commercial information that an agency has decided to withhold from its public rulemaking  
11 docket, which this Recommendation calls “protected material.” The Recommendation specifies

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<sup>1</sup> The public rulemaking docket is distinguished from “the administrative record for judicial review,” which is intended to provide courts with a record for evaluating challenges to the rule, and the “rulemaking record,” which means the full record of materials before the agency in an informal rulemaking and includes all materials the agency considered during the course of the rulemaking. *See* Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>2</sup> 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, *supra* note 1, ¶ 11, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. *See also* Admin. Conf. of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).



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12 how agencies should handle protected material, notwithstanding any countervailing benefits of  
13 disclosure. For purposes of this Recommendation, personal information is information that can  
14 be used to distinguish or trace an individual’s identity, either alone or when combined with other  
15 information.<sup>3</sup> Confidential commercial information is commercial information that is customarily  
16 kept private, or at least closely held, by the person or business providing it.<sup>4</sup> Other types of  
17 information, such as national security information and copyrighted materials, are beyond the  
18 Recommendation’s scope. The Recommendation is also limited to addressing procedures for  
19 protecting materials that agencies decide warrant protection. It is not intended to define the  
20 universe of protected materials.

**Commented [TR2]:** Note for the Committee: The Committee may wish to consider deleting this phrase or substituting the word “notwithstanding” for a different word.

21 Agencies accept public comments for their public rulemaking dockets primarily through  
22 Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that  
23 accept comments expressly notify the public that agencies may publish the information they  
24 receive in public comments.<sup>5</sup> When a person submits a comment to an agency, however, the  
25 agency typically does not immediately publish the comment. Instead, agencies generally take  
26 time to review comments before publishing them. Most agencies perform at least some kind of  
27 screening during this period.

**Commented [TR3]:** Note for the Committee: ACUS staff added these definitions to provide greater clarity.

28 For all agencies, whether to withhold or disclose protected material is governed by  
29 various laws: some mandate disclosure, some mandate withholding, and some leave agencies  
30 with substantial discretion in deciding whether to disclose. Although a full description of those

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<sup>3</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, MANAGING INFORMATION AS A STRATEGIC RESOURCE § 10 (37) (2016).

<sup>4</sup> See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

<sup>5</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>.



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31 laws is beyond the scope of this Recommendation, a brief overview of at least some of this body  
32 of law helps to identify issues at hand.

33 The Administrative Procedure Act requires agencies to “give interested persons an  
34 opportunity to participate in rulemaking through submission of written data, views, or  
35 arguments.”<sup>6</sup> The United States Court of Appeals for the D.C. Circuit has interpreted this  
36 provision to require ordinarily that agencies make publicly available the critical information—  
37 including studies, data, and methodologies—underlying proposed rules.<sup>7</sup>

38 The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed  
39 above. Generally, the Privacy Act prevents agencies from disclosing any information about a  
40 person, such as medical records, educational background, and employment history, contained in  
41 an agency’s system of records without that person’s written consent.<sup>8</sup> The Trade Secrets Act  
42 generally prevents agencies from disclosing trade secrets and other kinds of confidential  
43 commercial information, such as corporate losses and profits.<sup>9</sup>

44 Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the  
45 only exception relevant to this Recommendation is for information required to be released under  
46 the Freedom of Information Act (FOIA).<sup>10</sup> The Trade Secrets Act only has one exception, which  
47 covers any materials authorized to be disclosed by statute (including FOIA) or regulation.<sup>11</sup>  
48 Whether a particular piece of personal or confidential commercial information meets one of the  
49 exceptions often involves a complex determination that depends upon the exact type of

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<sup>6</sup> 5 U.S.C. § 553(c).

<sup>7</sup> See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>8</sup> 5 U.S.C. § 552a(b).

<sup>9</sup> 18 U.S.C. § 1905.

<sup>10</sup> 5 U.S.C. § 552a(b)(2).

<sup>11</sup> See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).



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50 information at issue and its contemplated use, and agencies must determine the applicability of  
51 the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of  
52 confidential commercial information may turn in part on whether the agency in receipt of the  
53 information assured the submitter that the information would be withheld from the public.<sup>12</sup> If an  
54 agency offers assurances that it will not disclose confidential commercial information, the  
55 agency and the submitter may rely on those assurances as a defense against compelled disclosure  
56 under FOIA. In many cases, agencies assure companies that they will not disclose such  
57 information in order to encourage companies to submit it.

58       Either by law or as a matter of discretion, agencies often consider certain types of  
59 personal information and confidential commercial information to be protected material (e.g.,  
60 trade secrets, social security numbers, bank account numbers, passport numbers, addresses, email  
61 addresses, medical information, and information concerning a person's finances), though  
62 particular cases are governed by specific requirements of law, not broad categorical labels.

63       There are many ways such protected material may arrive at the agency in a rulemaking. A  
64 person might submit his or her own information, intentionally or unintentionally, and then ask  
65 the agency not to disclose it. A third party might submit another person's information, with or  
66 without that person's knowledge. A company might submit a document containing its own  
67 confidential commercial information, intentionally or unintentionally, with or without the  
68 agency's prior assurance of protection. Or a company might submit another company's or  
69 person's information. Depending on the information in question, and the manner in which it was  
70 submitted, there may be issues of waiver of statutory protection. Such questions, like all  
71 questions regarding the substance of the laws governing protected material, are beyond this

**Commented [TR4]:** Note for the Committee: These paragraphs, which describe relevant law, replace a previous description of the law that the Committee asked us to extensively revise.

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<sup>12</sup> See *Food Mktg. Inst.*, 139 S. Ct. at 2361.



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72 Recommendation’s scope, but they illustrate the various considerations that agencies and the  
73 public often face in the submission and handling of such material.

74 This Recommendation prescribes steps agencies can take to withhold protected materials  
75 from their public rulemaking dockets while still providing the public with the information upon  
76 which agencies relied in formulating a proposed rule.<sup>13</sup>

### RECOMMENDATION

#### Recommendations for All Agencies

- 77 1. To reduce the risk that agencies will inadvertently disclose personal or confidential  
78 commercial information they determine should be withheld from the public rulemaking  
79 docket (hereinafter “protected material”), agencies should develop written policies that  
80 specify exactly what kinds of personal and confidential commercial information qualify  
81 as “protected material” and should clearly notify the public about their treatment of  
82 protected material. An agency’s notifications should:
- 83 a. Inform members of the public that comments are generally subject to public  
84 disclosure, except when disclosure is limited by law;
  - 85 b. Inform members of the public whether the agency offers assurances of protection  
86 from disclosure for their confidential commercial information and, if so, how to  
87 identify such information for the agency;

**Commented [TR5]:** Note for the Committee: These paragraphs, which describe examples of protected material, replace a previous description of examples that the Committee instructed us to extensively revise.

**Commented [TR6]:** Note for the Committee: This paragraph originally read: “Agencies should decide whether to withhold protected personal information or confidential commercial information (hereinafter ‘protected material’) from public rulemaking dockets, notwithstanding any countervailing public benefits of disclosure.” ACUS staff revised this because the original wording implies that agencies have a choice as to whether to withhold protected material whereas in many instances, the outcome may be prescribed by law. Additionally, the revised version introduces the notion of agencies’ establishing written policies, which was an implicit assumption underlying subsequent numbered paragraphs and is now explicit.

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<sup>13</sup> Permitting the submission of anonymous and pseudonymous comments is one way that some agencies attempt to reduce the privacy risks that commenters face when submitting protected material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing project of the Administrative Conference titled *Mass, Computer-Generated, and Fraudulent Comments* and are beyond the scope of this Recommendation.



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- 88 c. Instruct members of the public never to submit unique identification numbers  
89 such as social security numbers and other kinds of protected material that pertain  
90 to third parties, such as medical information and trade secrets;  
91 d. Advise members of the public to review their comments for the material identified  
92 above in (c) and, if they find such material, to remove it;  
93 e. Inform members of the public that they may request, during the period between  
94 when a comment is received and when it is made public, that protected material  
95 they inadvertently submitted be withheld from the public rulemaking docket;  
96 f. Inform members of the public that they may request, after the agency has  
97 published any comment, that protected material pertaining to themselves or to  
98 their dependents within the comment be removed from the public rulemaking  
99 docket; and  
100 g. Inform members of the public that the agency reserves the right to redact or  
101 aggregate any part of a comment if the agency determines that it constitutes  
102 protected material, or may withhold a comment in its entirety if it determines that  
103 redaction or aggregation would insufficiently prevent the disclosure of this  
104 material.
- 105 2. An agency should include the written policies and notifications described in Paragraph 1,  
106 or a link to those written policies and notifications, in at least the following places:
- 107 a. Within the rulemaking document on which the agency requests comments, such  
108 as a notice of proposed rulemaking or an advance notice of proposed rulemaking;  
109 b. On the agency’s own comment submission form, if the agency has one;  
110 c. Within any automatic emails that an agency sends acknowledging receipt of a  
111 comment;  
112 d. On any part of the agency’s website that describes its rulemaking process; and  
113 e. Within any notices of public meetings pertaining to the rule.
- 114 3. The General Services Administration’s eRulemaking Program Management Office  
115 should work with agencies that participate in Regulations.gov to include or refer to the

**Commented [TR7]:** Note for the Committee: No substantive changes were made to (c) and (d), but the Acting Committee Chair thinks they are worth revisiting. They are in tension with the statements in the preamble that “[t]he Recommendation is . . . limited to addressing procedures for protecting materials that agencies decide warrant protection. It is not intended to define the universe of protected materials.”

**Commented [TR8]:** Note for the Committee: This originally read “personal information.” The Acting Committee Chair believes that this paragraph should not be limited to “personal information.” Framing this recommendation broadly to cover all protected material will avoid the appearance of implying that this is not also an issue for confidential commercial information.

**Commented [TR9]:** Note for the Committee: This originally read “notifications” rather than “written policies and notification.” ACUS staff added “written policies” to conform with the changes made to Paragraph 1. This rationale also applies to the use of “written policies and notifications” in Paragraph 3.



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- 116 written policies and notifications described in Paragraph 1 within any automated emails  
117 Regulations.gov sends acknowledging receipt of a comment.
- 118 4. If a submitter notifies an agency that the submitter inadvertently included protected  
119 material in the submitter's comment, the agency should act as promptly as possible to  
120 determine whether such material warrants withholding from the public rulemaking docket  
121 and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove  
122 it from the public rulemaking docket.
- 123 5. Agencies should allow third parties to request that protected material pertaining to  
124 themselves or a dependent be removed from the public rulemaking docket. Agencies  
125 should review such requests and, upon determining that the material subject to the request  
126 qualifies as protected material, should remove it from the public rulemaking docket as  
127 promptly as possible.

### **Recommendations for Agencies That Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket**

- 128 6. Agencies that screen comments for **protected material** before publication in the public  
129 rulemaking docket, either as required by law or as a matter of agency discretion, should  
130 redact the protected material, if appropriate, and publish the rest of the comment, if such  
131 material appears infrequently. Redaction should be thorough enough to prevent a person  
132 from discerning the redacted material, but not so broad as to prevent the public from  
133 viewing non-protected material.
- 134 7. **If redaction is not feasible due to the high volume of protected material within a**  
135 **comment, agencies should consider presenting the data in a summarized form, such as an**  
136 **average (hereinafter "aggregation"). Agencies should work with data science experts and**  
137 **others in relevant disciplines to ensure that aggregation is thorough enough to prevent**  
138 **someone from disaggregating the data (i.e., relinking the aggregated data with the people**  
139 **to whom such data belong).**

**Commented [TR10]:** Note for the Committee: This, and all other uses of the term "protected material" within this section, initially read "personal information." Christopher Yoo's research revealed that some agencies do screen comments for confidential commercial information (even though, as his report notes, screening for such information may be unnecessary) and the Acting Committee Chair believes that paragraphs 6–9 apply with equal force to such agencies. Framing this recommendation broadly to cover all protected material will avoid the appearance of implying that this is not also an issue for confidential commercial information.

**Commented [TR11]:** Note for the Committee: No substantive changes were made to this paragraph, but the Committee may wish to consider whether the more likely scenario is an agency's aggregating multiple comments (rather than data contained within a single comment) and, if so, whether to rephrase this paragraph.



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- 140 8. If redaction and aggregation would still permit a member of the public to identify  
141 protected material, agencies should withhold the comment in its entirety. When doing so,  
142 they should describe the withheld material for the public in as much detail as possible  
143 without compromising its confidentiality. Agencies should include such descriptions  
144 within the preambles to pertinent final rules. Agencies should also include, on the parts of  
145 their websites that describe their rulemaking processes, their general policy, if any, with  
146 respect to preparing such descriptions and their policies with respect to redacting,  
147 aggregating, and withholding protected material.
- 148 9. When deciding whether and how to redact, aggregate, or withhold protected material,  
149 agencies should explore using a variety of artificial intelligence-based tools to aid in  
150 identifying protected material. Agencies should speak with private sector experts and  
151 technology-focused agencies, such as the General Services Administration’s Technology  
152 Transformation Service and the Office of Management and Budget’s United States  
153 Digital Service, to determine which tools are most appropriate and how they can best be  
154 deployed given the agencies’ resources.

**Commented [TR12]:** Note for the Committee: This originally read “agencies should consider preparing explanatory staff or technical reports and should publish these reports on the parts of their websites that describe their rulemakings processes and within the preambles to final rules.” The ACUS staff changed this because the terms “explanatory staff or technical reports” are not clear and the revised language captures what seems to have been the Committee’s intent here.

### 155 **Recommendations for Agencies That Offer Assurances of Protection from** 156 **Disclosure of Confidential Commercial Information**

- 157 10. Agencies that offer assurances of protection from disclosure of confidential commercial  
158 information should decide how they will offer such assurances. Agencies can choose to  
159 inform submitters, directly upon submission, that they will withhold confidential  
160 commercial information from the public rulemaking docket; post a general notice  
161 informing submitters that confidential commercial information will be withheld from the  
162 public rulemaking docket; or both.
- 163 11. Such agencies should adopt policies to help them identify such information. Agencies  
164 should include the following, either in tandem or as alternatives, as part of their policies:





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- 165 a. Instructing submitters to clearly identify that the document contains confidential  
166 commercial information;
- 167 b. Instructing submitters to flag the particular text within the document that  
168 constitutes confidential commercial information; and
- 169 c. Instructing submitters to submit both redacted and unredacted versions of a  
170 comment that contains confidential commercial information.