



Working Group on Compiling Administrative Records

Office of the Chairman

Staff Counsel Report for Working Group | July 21, 2020

Members Attending

James Barton
Reeve Bull
Daniel Cohen
Peter Constantine
Kelly Dunbar
Claire Evans
Noelle Green
Lane Nemirow
Connor Raso
Melissa Rifkin
Adina Rosenbaum
Adam White
Matthew Wiener

ACUS Staff Attending

Jeremy Graboyes (Staff Counsel)
Shawne McGibbon
Bobby Ochoa
Nathan Tomasso
Gavin Young

Guests Attending

Megan Heller
Tim Mullins

1 This Report documents the Staff Counsel’s notes of the discussion of the Working Group
2 on Compiling Administrative Records at its third meeting on July 21, 2020. In its current form,
3 the Report does not represent the work product of the Working Group or any of its members. The
4 Working Group will discuss the Report at its fourth meeting. A subsequent draft will reflect any
5 comments by the Working Group or its members.

6 The Staff Counsel opened the meeting by offering an opportunity for the Working
7 Group’s members to provide comments on the Staff Counsel Report documenting the meeting of
8 January 15, 2020.¹ There were no comments.

¹ See Jeremy Graboyes, Staff Counsel Report for Working Group on Compiling Administrative Records, January 15, 2020 (Mar. 11, 2020), <https://www.acus.gov/meeting-minutes/1-15-2020-meeting-staff-counsel-report-draft>.

9 At its previous meetings, the Working Group discussed best practices for explaining to
10 agency personnel which materials they should add to the rulemaking record during the course of
11 an informal rulemaking proceeding.² At its third meeting, the Working Group discussed the
12 actual process by which agency personnel add those materials to the rulemaking record and how
13 they manage and preserve rulemaking records. The Working Group focused, in particular, on
14 best practices for explaining those processes to agency personnel in publicly available guidance.
15 Parts 1–5 of this Report address the Working Group’s discussion of those subjects. Part 6
16 identifies related topics the Working Group may wish to address in its final product.

17 **1. What Is the Rulemaking Record?**

18 Existing agency guidance typically refers to a rulemaking record by reference to its
19 contents but without specifying its form. For example, guidance from the Department of the
20 Interior Department refers to a “collection of documents” that should “be kept in an accessible
21 location,”³ while the Internal Revenue Manual refers only to a “legal file.”⁴

22 Before widespread electronic recordkeeping, agencies maintained rulemaking records as
23 a physical folder or a “box with a bow.” Most agencies today compile rulemaking materials
24 electronically, though agencies may “maintain elements of rulemaking records in paper and in
25 electronic form.”⁵

26 Research previously conducted for the Administrative Conference of the United States
27 (ACUS) indicates that agencies today use a wide variety of management tools and techniques
28 ranging “from simple file saving on a shared drive to a dedicated electronic records management
29 system.”⁶ Some agencies use electronic management systems originally “designed for more
30 general recordkeeping purposes and adapted for rulemaking record use.”⁷ Members of the

² “Informal rulemaking proceeding” means a rulemaking conducted according to the notice-and-comment provisions of 5 U.S.C. § 553.

³ Dep’t of the Interior, Standardized Guidance on Compiling a Decision File and an Administrative Record 5 (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf>.

⁴ INTERNAL REVENUE MANUAL § 32.1.2.1(1), <https://www.irs.gov/irm/part32> (last visited Sep. 27, 2019).

⁵ Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking 44–45 (May 14, 2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report>.

⁶ *Id.*

⁷ *Id.*

31 Working Group stated that agencies frequently use off-the-shelf software programs including
32 Microsoft Excel to index record materials and Microsoft SharePoint to store record materials.

33 The Working Group acknowledged that there is likely no single tool that will be
34 appropriate for all agencies and agency components in all informal rulemaking proceedings.
35 Instead, the Working Group focused on identifying factors that agencies should consider when
36 they select an appropriate recordkeeping tool, including:

- 37 • the availability of resources to purchase or develop a more robust recordkeeping
38 system and the need for such a system;
- 39 • the existence of other agency electronic recordkeeping systems that the agency can
40 modify for rulemaking purposes;
- 41 • the complexity of typical agency rulemaking proceedings;
- 42 • the degree to which typical rulemaking proceedings are centralized in a single office
43 or dispersed across multiple offices or agencies;
- 44 • the level of security required for rulemaking records;
- 45 • the volume of materials in typical agency rulemaking proceedings;
- 46 • the format of typical rulemaking materials (e.g., paper or electronic; text-based, data
47 files, images, maps, physical objects);
- 48 • the number of individuals who manage or need access to rulemaking records; and
- 49 • the skillset and technological capacity of individuals who manage or need access to
50 rulemaking records.

51 Consistent with ACUS’s recommendation that agencies should explain in written guidance the
52 “relevant capabilities and limitations of recordkeeping tools and technologies,”⁸ the Working
53 Group may wish to address, in its final product, whether there are any particular software
54 programs that agencies should, at a minimum, consider when they select an appropriate
55 recordkeeping tool.

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⁸ Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ¶ 11(f), 78 Fed. Reg. 41,358 (July 10, 2013).

57 **2. Identifying Materials for Inclusion in the Rulemaking Record**

58 ACUS has recommended that agencies include in the rulemaking record: (a) notices
59 pertaining to the rulemaking; (b) comments and other materials submitted to the agency related
60 to the rulemaking; (c) transcripts or recordings, if any, of oral presentations made in the course of
61 a rulemaking; (d) reports or recommendations of any relevant advisory committees; (e) other
62 materials required by statute, executive order, or agency rule to be considered or to be made
63 public in connection with the rulemaking; and (f) any other materials considered by the agency
64 during the course of the rulemaking.⁹

65 At its first two meetings, the Working Group discussed which materials are “considered
66 by the agency during the course of a rulemaking” and best practices for explaining to rulemaking
67 personnel how to identify such materials. In theory, agencies could require rulemaking personnel
68 to add all such materials to a designated rulemaking record during an informal rulemaking. In
69 practice, however, many materials are already stored in other systems, including those controlled
70 by the agency (e.g., public rulemaking dockets, shared network drives, web-based collaboration
71 sites like Microsoft SharePoint, email, physical libraries, internal databases) and those managed
72 by entities outside the agency (e.g., subscription databases, the internet).

73 Members of the Working Group noted that it may be redundant for personnel to spend
74 time adding materials to the rulemaking record that are adequately maintained in a stable form
75 elsewhere. Stable sources may include widely-available print publications and print or electronic
76 materials that agencies collect elsewhere (as in a public rulemaking docket) or preserve under
77 other federal recordkeeping policies (such as the National Archives and Records
78 Administration’s Capstone approach for managing email). Depending on the source and the
79 manner in which it is associated with the rulemaking, it may be sufficient to note the material in
80 an index associated with a rulemaking record. In other scenarios, even indexing may be
81 redundant. On the other hand, some sources, especially internet-based sources, can be more
82 ephemeral and may warrant preservation and inclusion in a rulemaking record maintained by
83 agency personnel.

⁹ *Id.* ¶ 1.

84 As appropriate, agencies may wish to explain to rulemaking personnel: (a) which
85 materials they should add to rulemaking records; (b) which materials they should index but not
86 necessarily add to rulemaking records; and (c) which materials “considered by the agency during
87 the course of a rulemaking” they do not need to add to rulemaking records or index.

88 **3. Preparing Materials for, Adding Materials to, and Managing the Rulemaking**
89 **Record**

90 Agencies sometimes have practices for personnel to format, label, excerpt, or
91 contextualize materials before adding them to the rulemaking record. There are also processes to
92 redact, segregate, or otherwise protect sensitive or protected materials, as well as processes to
93 document unrecorded oral communications.¹⁰ It is unclear to what extent agencies have formally
94 memorialized these sorts of practices. Given employee turnover, members of the Working Group
95 felt that agencies should memorialize these practices to preserve institutional knowledge.

96 In terms of memorializing these practices, the Working Group considered whether
97 agencies should develop guidance specific to some or all of the different categories of materials
98 personnel frequently encounter during informal rulemaking proceedings. Categories include: (a)
99 print publications, which can range from single-page documents to book-length or multi-volume
100 materials; (b) printed images, diagrams, photographs, and maps; (c) electronic text-based
101 documents, including Microsoft Word and Portable Document Format (PDF) files; (d) digital
102 images, photographs, and maps; (e) webpages; (f) digital data files and databases, including
103 Microsoft Excel and comma-separated values files; (g) computer models and data analysis
104 programs; (h) emails; (i) personal notes, which may be electronic or handwritten; (j) audiovisual
105 materials, including audio and video recordings of oral communications; (k) memoranda to the
106 record documenting unrecorded oral communications; (l) physical objects; and (m) internal
107 workflow materials, including transmittals and inputs in workload management systems.

¹⁰ The Working Group has previously considered using memoranda to the record to document ex parte communications. Staff Counsel Report for Working Group Meeting of January 15, 2020, at 14, <https://www.acus.gov/meeting-minutes/1-15-2020-meeting-staff-counsel-report-draft>. A member of the Working Group suggested that agencies could generate a simple, standard form for officials to memorialize telephone calls and other conversations as needed. The availability of this form allows recordkeeping staff to set expectations for rulemaking personnel at the beginning of the rulemaking process and can serve as a helpful reminder throughout the rulemaking process to document appropriate conversations.

108 One member of the Working Group felt that providing too much detail on preparing and
109 submitting digital materials could become outdated as technologies evolve and agencies update
110 their recordkeeping practices or adopt new software programs. The Working Group may wish to
111 address in its final report whether there are any principles for balancing the desire for relatively
112 evergreen guidance and the need to provide sufficiently detailed instructions to help personnel
113 accurately and efficiently compile rulemaking records.

114 The Working Group briefly considered how rulemaking personnel should add materials
115 to the rulemaking record. Although the precise method for adding rulemaking materials will
116 obviously depend on the tool an agency uses to compile rulemaking records, there was general
117 agreement that, in a typical rulemaking, a single person should have primary responsibility for
118 managing or coordinating the rulemaking record, for purposes of both accuracy and efficiency.
119 ACUS has also recommended that agencies assign a custodian to manage and coordinate
120 recordkeeping tasks and that agencies direct personnel to “deposit rulemaking record materials
121 with the [designated] custodian(s), excepting if necessary confidential information to which
122 access is restricted.”¹¹ The responsibilities of this “record custodian” are discussed in Part 5.
123 Other staff may assist the custodian, of course, especially in rulemakings involving a high
124 volume of potential record materials.

125 The Working Group may wish to consider addressing, in its final product: (1) the process
126 by which rulemaking personnel should deposit materials to the record custodian, (2) the process
127 by which rulemaking personnel should ask the record custodian to add an undeposited material
128 to the index for the rulemaking record, and (3) whether rulemaking personnel should supply any
129 additional information or metadata about deposited or indexed materials. As suggested by
130 members of the Working Group, such additional information or metadata could include a
131 record’s author, date of authorship, recipient, transmittal date, etc. Other information that may be
132 useful for organizational and retrieval purposes includes the document type or a unique identifier
133 (e.g., Bates stamping).

134 **4. Closing and Preserving the Rulemaking Record**

¹¹ Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013), <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>.

135 As the Working Group has previously discussed, the rulemaking record ordinarily closes
136 once the agency has made a final decision (e.g., finalizes or withdraws a proposed rule). Steps to
137 close the record may include, as appropriate, electronically locking an electronic file, changing
138 permissions on a shared drive, and alerting personnel that the rulemaking record is closed. Steps
139 to preserve the rulemaking record may include moving it to another electronic or physical
140 location, particularly one that attorneys can access if it is later necessary to compile an
141 administrative record for judicial review. Agencies should also consider the requirements of
142 other applicable federal recordkeeping policies.

143 **5. Assigning Responsibilities to Appropriate Rulemaking Personnel**

144 The Working Group considered how agencies should divide tasks related to managing
145 rulemaking records among its personnel. Relevant tasks may include: (a) creating the rulemaking
146 record; (b) identifying which documents belong in the rulemaking record; (c) compiling and
147 organizing the rulemaking record; (d) labeling, tagging, or adding metadata to rulemaking record
148 materials; (e) indexing the rulemaking record; (f) digitizing non-electronic materials; (g) storing
149 and safeguarding physical objects; (h) handling and safeguarding classified or other protected
150 information; (i) managing access to the rulemaking record, including sensitive materials; (j)
151 documenting the recordkeeping process; (k) managing or working with other personnel to
152 manage the public rulemaking docket during the rulemaking process; (l) ensuring that the
153 rulemaking record is preserved after the rulemaking process has ended; and (m) working with
154 agency or Department of Justice attorneys to compile an administrative record for judicial review
155 in the event of litigation.

156 As noted above, the Working Group felt that a single person should have primary
157 responsibility for maintaining and indexing each rulemaking record. (Of course, other staff may
158 assist the custodian as a matter of practice.) Agencies should consider explaining in public
159 guidance the role of these “record custodians,” the specific tasks assigned to record custodians,
160 the responsibilities of other rulemaking personnel, and the relationship between record
161 custodians and other rulemaking personnel. For example, written guidance could explain that
162 rulemaking personnel should direct questions about the rulemaking record to the custodian
163 and/or that the custodian serves as a point of contact for agency attorneys. One member of the
164 Working Group suggested that agencies may wish to use written guidance to assign custodians

165 responsibility for more proactive tasks such as affirmatively seeking out records from
166 rulemaking personnel, training personnel on rulemaking recordkeeping requirements, notifying
167 relevant personnel of their recordkeeping obligations at the outset of a proceeding, and
168 periodically reminding rulemaking personnel of their rulemaking recordkeeping obligations.

169 To the extent agencies list custodial responsibilities in their published policies on
170 compiling administrative records agencies, they will need to take into account their own specific
171 needs and circumstances. Relevant factors may include an agencies' size and organizational
172 structure, and the characteristics of typical rulemaking proceedings. Indeed, the optimal division
173 of labor between a custodian(s) and other rulemaking personnel could depend on any number of
174 factors such as the frequency and complexity of rulemakings, the number of staff involved in
175 typical rulemakings, the relative experience of personnel, the quantity of materials maintained in
176 typical rulemaking records, and differences among program offices within a single agency.

177 Agencies may also wish to explain in written guidance how custodians are selected. Here,
178 too, the precise guidance will necessarily depend on the factors listed in the previous paragraph.
179 Agencies can assign custodial duties to a centralized office responsible for managing dockets or
180 rulemaking procedures or to an individual in the program office with primary responsibility for
181 substantively developing a rule. The Working Group generally agreed that, where recordkeeping
182 responsibility rests with a program office, the head of that office should select an appropriate
183 custodian. A record custodian should be someone who possesses the skills and access necessary
184 to perform his or her assigned tasks assigned to him or her. Depending on an agency's needs, this
185 could be someone who has (a) access to relevant records, potentially including classified or other
186 sensitive materials; (b) substantial involvement in the rulemaking; (c) the ability to identify
187 which documents belong in a rulemaking record; and/or (c) the ability to effectively coordinate
188 with rulemaking personnel and officials, especially attorneys, in other components. More
189 complicated questions may arise when multiple components share responsibility for developing a
190 rule or when multiple agencies jointly develop a rule.

191 **6. Topics the Working Group May Wish to Address in its Final Product**

192 Based on this Report, the Working Group may wish to address some or all of the
193 following topics in its final product:

- 194 • What principles should agencies consider when selecting tools and technologies to
195 manage rulemaking records?
- 196 • Are there any commonly used or widely available tools and technologies that
197 agencies should consider using to manage rulemaking records?
- 198 • Of those materials “considered by the agency during the course of a rulemaking,”
199 which materials should rulemaking personnel index and/or add to the actual
200 rulemaking record?
- 201 • What steps should rulemaking personnel to prepare materials for inclusion in the
202 rulemaking record (e.g., formatting, labeling, excerpting, redacting, contextualizing,
203 etc.)?
- 204 • What steps should rulemaking personnel take to memorialize unrecorded oral
205 communications for inclusion in the rulemaking record?
- 206 • What steps should rulemaking personnel take to add materials to the rulemaking
207 record and/or ensure they are indexed?
- 208 • How should rulemaking personnel index and organize the rulemaking record?
- 209 • Should agencies specify in written guidance the processes for preparing particular
210 formats of materials (e.g., print materials, webpages, emails, etc.) and adding them to
211 the rulemaking record? If so, are there any principles for balancing the desire for
212 relatively evergreen guidance and the need to provide sufficiently detailed
213 instructions to help personnel compile rulemaking records?
- 214 • What metadata should be associated with rulemaking record materials and how
215 should it be associated?
- 216 • What steps should rulemaking personnel take to close the rulemaking record, preserve
217 and provide access to the rulemaking record during the period when litigation is
218 likeliest, and preserve and provide access in the longer term?
- 219 • What are the responsibilities of the record custodian, and what are the responsibilities
220 of other rulemaking personnel?
- 221 • Who serves as the record custodian, and how is the record custodian selected?