



## Working Group on Compiling Administrative Records

### Office of the Chairman

#### Staff Counsel Report for Working Group | April 19, 2021

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##### Members Attending

Reeve Bull  
Noelle Green  
Allyson Ho  
Melissa Rifkin  
Adina Rosenbaum  
Matthew Wiener

##### ACUS Staff Attending

Jeremy Graboyes (Staff Counsel)  
Shawne McGibbon  
Gavin Young

##### Guests Attending

Tim Mullins (DOT)  
Emily Lesniak (IRS)  
Diana Hobbs

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1           This Report documents the Staff Counsel’s notes of the discussion of the Working Group  
2 on Compiling Administrative Records at its fifth meeting on April 19, 2021. 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 sixth 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 February 23, 2020.<sup>1</sup> There were no comments.

9           At its first three meetings, the Working Group discussed best practices for explaining to  
10 agency personnel which materials they should add to internal rulemaking records, i.e., “the full

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<sup>1</sup> See Jeremy Graboyes, Staff Counsel Report for Working Group on Compiling Administrative Records, Feb. 23, 2021 (Mar. 19, 2021), <https://www.acus.gov/meeting-minutes/2-23-2021-meeting-staff-counsel-report-draft>.

11 record materials before the agency in an informal rulemaking,” including those materials which  
12 are not ordinarily made publicly available.<sup>2</sup>

13 At its fourth meeting, the Working Group turned to the public rulemaking docket, i.e.,  
14 “the public version of the rulemaking record managed by the agency, regardless of location, such  
15 as online at Regulations.gov or an agency website or available for physical review in a docket  
16 room.”<sup>3</sup> Specifically, the Working Group discussed best practices for explaining to agency  
17 personnel which materials they should add to or exclude from public rulemaking dockets.

18 At its fifth meeting, the Working Group discussed the processes by which agency  
19 personnel add materials to the public rulemaking docket. Topics addressed were: (1) compiling  
20 and indexing the docket, (2) managing sensitive and protected information, (3) handling other  
21 recurring and emerging public comment issues, and (4) preserving the docket. Parts 1–4 of this  
22 Report describe the Working Group’s discussion of these topics. Part 5 identifies related topics  
23 the Working Group may wish to address in its final product.

### **1. How Should Rulemaking Personnel Compile and Index the Public Rulemaking Docket?**

24 The E-Government Act requires that agencies maintain an electronic docket for each  
25 rulemaking. Some agencies maintain the electronic docket on their websites. Others maintain the  
26 docket on Regulations.gov, a website managed by the General Services Administration (GSA).  
27 GSA manages the website and has issued some instructions for agencies and the public on its  
28 use. Individual agencies are responsible for creating, uploading materials to, and maintaining  
29 their own rulemaking dockets on Regulations.gov.

30 Members of the Working Group believed it would be sufficient to direct agencies to  
31 GSA’s instructions for using Regulations.gov. Those instructions also contain guidance on how  
32 agencies can use Regulations.gov to index docket materials. Consistent with Recommendation  
33 2011-2, *Rulemaking Comments*,<sup>4</sup> agencies may also wish to include in guidance to rulemaking

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<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Information Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013). “Informal rulemaking” means rulemaking conduct according to the notice-and-comment provisions of 5 U.S.C. § 553.

<sup>3</sup> *Id.*

<sup>4</sup> 76 Fed. Reg. 48791 (Aug. 9, 2011).

34 personnel any policy on how soon after receipt staff should post public comments to the  
35 electronic docket.

36 Some agencies also provide reading-room access to a physical docket, especially to  
37 facilitate public inspection of physical objects (e.g., models), records that cannot easily be made  
38 available online (e.g., large databases), or records that the agency cannot or does not wish to  
39 distribute online (e.g., copyright-protected materials, as discussed in the next section). Agencies  
40 may wish to explain in guidance to rulemaking personnel which materials, if any, they should  
41 include in a physical docket instead of, or in addition to, the electronic docket. Agencies may  
42 also wish to describe whether, and, if so, how agencies should reference in the electronic docket  
43 those items available that are only available for public inspection in the physical docket.

## **2. How Should Rulemaking Personnel Manage Sensitive and Protected Information in the Public Rulemaking Docket?**

44 The Administrative Procedure Act generally requires agencies to make publicly available  
45 all critical material underlying a rulemaking. However, as the Working Group discussed at its  
46 fourth meeting, various federal laws and policies prohibit agencies from disclosing or allow  
47 agencies to withhold certain sensitive or protected information without the consent of its owner.  
48 Applicable laws include the Freedom of Information Act (FOIA), the Privacy Act, and the Trade  
49 Secrets Act. The following two sections address agency process for handling confidential  
50 business information (CBI) and personally identifiable information (PII) submitted by public  
51 commenters. A third section briefly addresses issues related to copyrighted materials.

### **a. Confidential Business Information**

52 Agencies have adopted various policies to identify and, when appropriate, withhold CBI  
53 from the public rulemaking docket. Some screen comments for CBI, which can be a very labor-  
54 intensive process. Some ask or require commenters to submit information they claim to be CBI  
55 outside of Regulations.gov or the agency's usual comment submission process, for example by  
56 email or mail or via a secure file transfer application. Some ask or require commenters to clearly  
57 delineate any information in their comments that they claim to be CBI.

58           Once agencies receive information they claim to be CBI, rulemaking personnel can either  
59 accept the commenter’s word or independently determine whether the information is properly  
60 CBI. (Members of the Working Group appeared to evince a strong preference for the latter.)

61           After deciding that a comment contains CBI, rulemaking personnel must determine how  
62 to handle the comment for purposes of the rulemaking docket. Agencies generally add comments  
63 containing CBI to a separate docket that is not available to the public. Many also post a notice in  
64 the public rulemaking docket stating that they have received a comment containing CBI or post  
65 the comment to the public rulemaking docket with all CBI redacted.

66           Finally, agencies must determine who should handle requests to inspect CBI and the  
67 process for doing so. Some agencies require requestors to follow the normal process for  
68 requesting records under FOIA. Others have established processes specific to CBI.

69           ACUS recently issued Recommendation 2020-2, *Protected Materials in Public*  
70 *Rulemaking Dockets*, which offers agencies best practices for handling these and other related  
71 issues. Members of the Working Group agreed it would be sufficient to direct agencies to  
72 Recommendation 2020-2 for guidelines on how to draft guidance explaining to rulemaking  
73 personnel how they should handle CBI received during the notice-and-comment process.

**b.       Personally Identifiable Information**

74           Federal law generally prohibits agencies from disclosing PII contained in systems of  
75 records without the written consent of the person to whom the information pertains. Agencies  
76 frequently advise commenters that any personal information they submit will be made publicly  
77 available as part of the rulemaking docket. More difficult questions can arise when commenters  
78 submit PII that belongs to a third party.

79           Recommendation 2020-2 offers agencies best practices for handling these and other  
80 related issues. Members of the Working Group agreed it would be sufficient to direct agencies to  
81 Recommendation 2020-2 for guidelines on how to draft guidance explaining to rulemaking  
82 personnel how they should handle PII received during the notice-and-comment process.

**c. Copyrighted Materials**

83 Public commenters sometimes submit copyrighted materials, such as articles or images,  
84 as part of or as attachments to their comments. Although these materials can be relevant to a  
85 rulemaking, agencies are often hesitant to add them to the online docket out of fear that they may  
86 be liable for publishing or distributing them without the copyright holders’ consent. Some  
87 agencies impose specific requirements for submitting copyright-protected materials, for example  
88 by requiring proof that the submitted owns the copyright to the submitted work. Several make  
89 copyrighted materials available for public inspection in a reading room, but not as part of the  
90 online docket. Agencies may wish to explain in guidance how rulemaking personnel should  
91 handle copyrighted materials received from the public during the notice-and-comment process.

**3. How Should Rulemaking Personnel Handle Other Recurring and Emerging Public Comment Issues?**

92 It was briefly noted that mass-comment campaigns and fraudulent comments may pose  
93 docket management challenges. Because the ACUS Committee on Rulemaking is currently  
94 considering a project on *Mass, Computer-Generated, and Fraudulent Comments*,<sup>5</sup> the Working  
95 Group agreed to postpone discussion of these topics until the conclusion of that project.

96 The Working Group briefly discussed the exclusion of comments containing profane,  
97 threatening, and abusive language. It was noted that the Environmental Protection Agency has a  
98 policy of rejecting “[c]omments containing threatening language or profanity.”<sup>6</sup> Agencies that  
99 prohibit submission of profane, threatening, or abusive language may wish to explain to  
100 rulemaking personnel what language qualifies as profane, threatening, or abusive and what  
101 actions rulemaking personnel should take with respect to comments containing such language.  
102 One member of the Working Group also noted that agencies should be mindful of any rights  
103 commenters may have under the First Amendment to the United States Constitution.

104 Another member of the Working Group noted that agencies that accept comments by  
105 email may receive junk email in response to *Federal Register* notices that clearly does not relate

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<sup>5</sup> *Mass, Computer-Generated, and Fraudulent Comments*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/mass-computer-generated-and-fraudulent-comments> (last visited Apr. 22, 2021).

<sup>6</sup> *Commenting on EPA Dockets*, ENVTL. PROT. AGENCY, <https://www.epa.gov/dockets/commenting-epa-dockets> (last visited Apr. 22, 2021).

106 to the rulemaking. Agencies that accept comments by email may wish to explain to rulemaking  
107 personnel how they should handle such messages.

#### 4. How Should Rulemaking Personnel Preserve the Public Rulemaking Docket?

108 Agencies must preserve and dispose of their rulemaking records in accordance with  
109 records retention schedules established by individual agencies. Agencies may wish to explain  
110 those policies to rulemaking personnel as part of their guidance on compiling rulemaking  
111 records. (As of April 2020, there is no longer a General Records Schedule from the National  
112 Archives and Records Administration (NARA) that governs rulemaking records.<sup>7</sup>)

#### 5. Topics the Working Group May Wish to Address in its Final Product

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

- 115 • What is the ordinary process for creating an electronic docket and adding materials to  
116 the electronic docket throughout the rulemaking process?
- 117 • As applicable, what is the ordinary process for creating a physical docket and adding  
118 materials to the physical docket throughout the rulemaking process?
- 119 • How should rulemaking personnel manage sensitive and protected information—  
120 including CBI, PII, and copyrighted materials—that the agency receives during the  
121 notice-and-comment process?
- 122 • Are there any special processes for handling profane, threatening, or abusive  
123 language submitted during the notice-and-comment process?
- 124 • Are there any special processes for handling spam or other materials received during  
125 the notice-and-comment process that clearly do not relate to the rulemaking?
- 126 • What actions should rulemaking personnel take to preserve the public rulemaking  
127 docket after the rulemaking has ended?

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<sup>7</sup> Nat'l Archives & Records Admin., The General Records Schedules, Transmittal 31 (Apr. 2020).