Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: April 1822, 2013
Re: Further Revised Draft Recommendation – Administrative Record Project

The following draft recommendation is based on a draft report prepared by Leland E. Beck, Esq. entitled *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records* as well as discussions of the Committee on Judicial Review at its March 19, 2013 and April 3, 2013 public meetings and comments of Conference Members. The draft recommendation is intended to facilitate the Committee’s discussion at its April 22, 2013 public meeting, and not to preempt the Committee’s discussion and consideration of any proposed recommendations. In keeping with the Conference’s past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

The Administrative Record in Informal Rulemaking

Preamble

The administrative record of informal rulemaking plays an essential role in informing the public of potential agency action and in improving the public’s ability to understand and participate in agency decisionmaking. As well, the administrative record can be essential to judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which directs courts to “review the whole record or those parts of it cited by a party” to determine
whether challenged agency action is lawful.\(^1\) This statutory language was originally understood as referring to formal proceedings. However, the Supreme Court has long interpreted this APA provision as also encompassing the “administrative record” in informal agency proceedings, whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.\(^2\) This application to informal proceedings has given rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept—at times inconsistently. As a result, confusion has arisen about the distinctions between internal agency rulemaking records, public rulemaking dockets, and administrative records for judicial review.

The Administrative Conference therefore commissioned a study of federal agencies’ current practices in the development of internal rulemaking records, public rulemaking dockets, and administrative records for judicial review.\(^3\) This recommendation and the supporting Report address these concepts in the context of informal agency rulemaking adopted pursuant to the notice-and-comment procedures prescribed in 5 U.S.C. § 553.\(^4\) The recommendation does not address the record for agency decisions made in other contexts, such as in adjudication, formal rulemaking, or guidance documents.

This recommendation builds upon earlier Administrative Conference work in the areas of rulemaking, recordkeeping, and technological developments in managing records. Administrative Conference Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, identified the administrative materials that should be available to a court that was evaluating, on preenforcement review, the factual basis for agency rules of general

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4 5 U.S.C. § 553(b)-(d). It may also have application to “hybrid” rulemaking statutes that require additional procedures beyond those in § 553 but less than those in formal rulemaking under 5 U.S.C. §§ 556-57.
applicability. That recommendation was receptive to judicial development of the concept of a “record” on review of informal agency rulemakings. In Recommendation 93-4, Improving the Environment for Agency Rulemaking, the Administrative Conference advised agencies to establish and manage rulemaking files “so maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review.” A number of Administrative Conference recommendations also have examined the use of technology in acquiring, releasing, and managing agency records. Most recently, the Conference examined legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.

This recommendation synthesizes and updates the Conference’s prior recommendations in these areas. It is grounded in empirical research, supported by a survey questionnaire on present agency recordkeeping practices as well as by the collection of existing agency guidance. The Conference has identified and recommends best practices for all rulemaking agencies in the areas of record compilation, preservation, and certification. The Conference recommendation also advises agencies to develop guidance to aid agency

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8 Recommendation 2011-1, supra note 7.

9 Beck Report, supra note 3, at Section III.
personnel as they compile rulemaking and administrative records and to increase public understanding of agency recordkeeping.\textsuperscript{10}

Agencies engage in informal rulemaking with differing frequencies, resources, and technological capabilities. Many agencies are in a period of transition, as they move from paper to electronic recordkeeping.\textsuperscript{11} Attention to the design of information technology resources that is mindful of the principles and best practices set forth below can aid agencies in administrative recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and more effective judicial review. For the purposes of this recommendation, the rulemaking record, public rulemaking docket, and the administrative record for judicial review are defined as follows:

“\textit{Rulemaking record}” means the full record of materials before the agency in an informal rulemaking, beginning no later than the date on which the agency publishes the notice of proposed rulemaking or the advance notice of proposed rulemaking, if there is one, and typically ending upon publication of the final rule.\textsuperscript{12} The Conference contemplates that, in addition to materials required by law to be included in the rulemaking record, as well as all

\textsuperscript{10} The Administrative Conference has generally recommended that agency policies affecting the public should be articulated and made known to the public to the greatest extent feasible. Administrative Conference of the United States, Recommendation 71-3, \textit{Articulation of Agency Policies}, 38 Fed. Reg. 19,788 (July 23, 1973).

\textsuperscript{11} The Office of Management and Budget and the National Archives have directed federal agencies to manage all permanent electronic records in an electronic format to the fullest extent possible by December 31, 2019, and to develop plans to do so by December 31, 2013. Memorandum from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, to the Heads of Executive Departments and Independent Agencies concerning “Managing Government Records Directive” M-12-18 (Aug. 24, 2012).

\textsuperscript{12} The rulemaking process begins, according to a prior recommendation by the Administrative Conference, “no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.” Administrative Conference of the United States, Recommendation 93-4, \textit{Improving the Environment for Agency Rulemaking}, 59 Fed. Reg. 4670 (Feb. 1, 1994), correction published, 59 Fed. Reg. 8507 (Feb. 12, 1994).
comments and materials submitted to the agency during comment periods, any material that the agency considered be part of that record.\(^{13}\)

“Consideration” implies review by an individual with substantive responsibilities in connection with the rulemaking; thus, a list of potentially helpful articles compiled by an intern at the request of an agency lawyer would probably not qualify. Consideration also implies some minimum degree of attention to the contents of a document. Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that was reviewed in order to evaluate its possible significance for the proceeding, unless the review disclosed that the document was completely nongermane to the subject matter of the proceeding. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factual or other analysis in the document, or because the agency did not or will not rely on it. Although the concept of consideration resists precise definition, it should be broadly interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and that to which the agency and others may refer in the future.

“Public rulemaking docket” means the public version of the rulemaking record managed by the agency, regardless of location, such as online at Regulations.gov or an agency website or available for physical review in a docket room. The public rulemaking docket includes all information that the agency has made available for public viewing. The Conference in this recommendation also urges agencies to manage their public rulemaking dockets to achieve maximum disclosure to the public. However, the Conference recognizes that prudential concerns may limit agencies from displaying some information online. It is best practice for

agencies to describe and note online materials that are not displayed but are available for physical inspection. Another agency best practice is to include in the public rulemaking docket materials generated by the agency prior to issuance of the final rule.

“Administrative record” for judicial review means the materials tendered by the agency and certified to a court as the record on review of the agency’s regulatory action. The administrative record provided to the court will also include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record being certified. Administrative records should also include an index itemizing their contents. Parties often rely on this index in designating portions of the administrative record for inclusion in a joint appendix that will be presented to the court. The joint appendix then typically serves as the basis for the court’s review, as provided in the Administrative Procedure Act and as appropriate under the rules of the reviewing court. Under the Administrative Procedure Act, and as appropriate under the rules of the reviewing court, the record on review may consist of those parts of the administrative record that are cited by a party. These materials are often presented to the court in the form of a joint appendix, preparation of which may be reliant on the index of administrative record contents.

Agency practices regarding the identification or inclusion of protected or privileged materials in administrative records and their accompanying indices vary. Some agencies never include or identify privileged materials in administrative records for judicial review.

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14 *Beck Report, supra* note 3, at Section IV.A.

15 *Id.*

16 5 U.S.C. § 706 (“the court shall review the whole record or those parts of it cited by a party”).


18 The variety of agency practices is described at length in the *Beck Report, supra* note 3, at Section IV.A.

19 Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support. *See In re Subpoena Duces*
Other agencies identify non-disclosed materials specifically in a privilege log provided with the index of the administrative record.\textsuperscript{20} Agencies have also noted redactions of protected materials in the public administrative record and moved the court to permit filing of a summary of protected materials under seal. Many agencies do not have a policy on inclusion of protected or privileged materials in an administrative record for judicial review and manage such materials on a case-by-case basis. Case-by-case consideration may occasionally be necessary, such as when privileged materials are referenced as the basis of the agency's decision. Nonetheless, the Conference recommends that agencies develop a written policy for treatment of protected or privileged materials in certification of the administrative record for judicial review, and that agencies make this policy publicly available.\textsuperscript{21}

Compilation and preparation of the administrative record for judicial review is properly within the province of the agency and this process should be accorded a presumption of regularity by the reviewing court.\textsuperscript{22} Completion or supplementation of the administrative record may be appropriate where a strong showing has been made to overcome the presumption of regularity in compilation. For example, courts have permitted limited discovery

\textsuperscript{20} \textit{E.g.}, Memorandum from Lois J. Schiffer, General Counsel, National Oceanic and Atmospheric Administration, to Administrators and Directors, National Oceanic and Atmospheric Administration, concerning “National Oceanic and Atmospheric Administration Guidelines for Compiling an Agency Administrative Record,” 6-7 (Dec. 21, 2012) (“When materials considered in the decision-making process are attorney-client privileged, deliberative process privileged . . . or otherwise protected by statutory or other legal principles of confidentiality or non-disclosure, they must be identified for the Administrative Record and listed on a Privilege Log. The Privilege Log, but not the documents, are then included in the Administrative Record for the Court.”).

\textsuperscript{21} Recommendation 71-3, supra note 10.

\textsuperscript{22} See Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy, 485 F.3d 1091, 1097 (10\textsuperscript{th} Cir. 1985) (“designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity”) (citation omitted); Amfac Resorts, LLC v. U.S. Dep’t of Interior, 143 F.Supp. 2d 7, 12 (D.D.C. 2001); see also United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).
on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency decisionmaker. Courts may also investigate allegations that the agency omitted information from the administrative record that should have been included.

Completion or supplementation of the administrative record for judicial review may also be appropriate in other circumstances not addressed in this recommendation. In previous recommendations, the Conference has recognized that the reviewing court should not invariably be confined to the record on review in evaluating the factual basis of a generally applicable rule on preenforcement review. The Conference has also acknowledged that, on direct review by courts of appeals, the record on review “can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.”

RECOMMENDATION

Record Contents

1. The Rulemaking Record. In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in an informal rulemaking proceeding should include:

(a) notices pertaining to the rulemaking;

(b) comments and other materials submitted to the agency related to the rulemaking;

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25 Recommendation 74-4, supra note 5.

(c) factual materials not included in the foregoing;

(d) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;

(e) reports or recommendations of any relevant advisory committees;

(f) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and

(g) any other materials considered by the agency during the course of the proceeding.

2. The Public Rulemaking Docket. Agencies should manage their public rulemaking dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking docket should include all materials in the rulemaking record, subject to legal limitations on disclosure and prudential concerns that might suggest not including some sensitive or confidential information online and instead noting that this material is available for physical review in a reading room.

3. The Administrative Record for Judicial Review. The administrative record provided to the court on judicial review of informal rulemaking should contain all of the materials in the rulemaking record as set forth in Recommendation 1 except for: a) materials protected from disclosure by law, and that are not presented under seal, and b) materials that the agency has determined are subject to withholding on the basis of legal privilege in the forum for review, and that it sees fit to withhold.

Rulemaking Recordkeeping

4. Agencies should begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking, or an advance notice of proposed rulemaking, if there is one. Agencies should typically close the rulemaking record upon publication of the final rule.
5. Agencies should index rulemaking records for informal rulemaking on an ongoing basis, at an appropriate level of detail, and consistent with legal privileges and the Freedom of Information Act, 5 U.S.C. § 552.

6. Agencies should designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s), excepting if necessary confidential information to which access is restricted. The custodian(s) should document the record compilation process.

Record Preservation

7. The National Archives and Records Administration (NARA) should consider amending its agency guidance to specifically indicate the official status and legal value of records relating to informal rulemaking, particularly administrative records for judicial review.

8. Agencies using electronic records management systems to manage rulemaking records, such as the Federal Document Management System or agency specific systems, should work with NARA to ensure the adequacy of such systems for archival purposes and the transferability of permanent records to the National Archives. Agencies should consider whether revision of their records schedules is appropriate in light of developments in electronic records management.

Administrative Record Certification

9. Agencies should develop procedures for designating appropriate individuals, who may or may not be record custodians, to certify administrative records to the court in case of judicial review of agency action. Agency certifications should include an index of contents of the administrative record.
10. Agencies should develop a general policy regarding treatment of protected or privileged materials in certification of the administrative record to the reviewing court, and make this policy publicly available.

Agency Record Guidance

11. Agencies that engage in informal rulemaking should issue guidance to aid personnel in implementing the above best practices. Agencies should make their guidance on informal rulemaking and administrative recordkeeping available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation.

The level of detail and contents of such guidance will naturally vary based on factors such as:

- the size of typical agency rulemaking records;
- institutional experience, or the lack thereof, with record compilation and informal rulemaking litigation;
- the need for consistency across agency components in the development and maintenance of rulemaking records; and agency resources. However, agencies should ensure that guidance addresses at least the following:

   (a) essential components of the rulemaking record, public rulemaking docket, and the administrative record for judicial review;

   (b) appropriate exclusions from the rulemaking record, including guidance on whether and when to exclude files such as personal notes or draft documents;

   (c) timing of compilation and indexing practices;

   (d) management and segregation of privileged materials, e.g., attorney work product or pre-decisional deliberative materials;

   (e) management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential business information;

   (f) policies and procedures, if any, for the protection of sensitive information submitted by the public during the process of rulemaking or otherwise contained in the rulemaking record;
(g) preservation of rulemaking and administrative records and public rulemaking dockets;

(h) certification of the administrative record for judicial review, including the process for identifying the appropriate certifying official; and

(i) relevant capabilities and limitations of recordkeeping tools and technologies.

Judicial Review

A reviewing court should afford the administrative record a presumption of regularity.

In appropriate circumstances, a reviewing court should permit or require completion or supplementation of the record on review. Supplementation or completion may be appropriate when the presumption of regularity has been rebutted, such as in cases where there is a strong showing that an agency has acted improperly or in bad faith or there are credible allegations that the administrative record for judicial review is incomplete.