



Administrative Conference Recommendation 2013-4

The Administrative Record in Informal Rulemaking

Adopted June 14, 2013

The administrative record in 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 compilation and uses of agency rulemaking records maintained internally, public rulemaking dockets, and administrative records for judicial review. The differences among these three types of records can be seen from their descriptions below.

The Administrative Conference therefore commissioned a study of federal agencies' current practices in the development of rulemaking records, public rulemaking dockets, and administrative records for judicial review.³ This recommendation and the supporting report

¹ 5 U.S.C. § 706.

² *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

³ LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING (May 14, 2013) (report to the Administrative Conference of the United States) [hereinafter Beck Report].



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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 applicability.⁵ 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 that 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.”⁶ A number of Administrative Conference recommendations also have examined the use of technology in acquiring, releasing, and managing agency records.⁷ Most

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.

⁵ Administrative Conference of the United States, Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974), based on consultant’s report published as Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

⁶ Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), *correction published*, 59 Fed. Reg. 8507 (Feb. 22, 1994).

⁷ Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 55 Fed. Reg. 53,270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 Fed. Reg. 5209 (Feb. 2, 1989).



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recently, the Conference examined legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.⁸

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 a review of existing agency guidance.⁹ The Conference has identified and recommends best practices for all rulemaking agencies in the areas of record compilation, preservation, and certification. The recommendation also advises agencies to develop guidance to aid agency personnel as they compile rulemaking and administrative records and public rulemaking dockets and to increase public understanding of agency recordkeeping.

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.¹⁰ Attention to the design of information technology resources that is mindful of the principles and best practices set forth below can aid agencies in 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:

⁸ Recommendation 2011-1, *supra* note 7.

⁹ *Beck Report*, *supra* note 3, at Section III.

¹⁰ 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 Agencies and Independent Agencies concerning "Managing Government Records Directive" M-12-18 (Aug. 24, 2012).



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“Rulemaking record” means the full record of materials before the agency in an informal rulemaking. The Conference contemplates that, in addition to materials required by law to be included in the rulemaking record, as well as all comments and materials submitted to the agency during comment periods, any material that the agency considered should be included as part of that record.

“Considered” entails review by an individual with substantive responsibilities in connection with the rulemaking.¹¹ To say that material was considered also entails 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 an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking. 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 resists precise definition, the term considered as used in this recommendation should be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and 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

¹¹ The Conference first recommended inclusion of materials “considered” by the agency in the administrative record for judicial review in Recommendation 74-4, *supra* note 5. Courts have also relied on the concept of consideration in defining the administrative record. *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted); *see also Nat’l Ass’n of Chain Drug Stores v. U.S. Dep’t of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Recommendation 74-4 in defining the administrative record); *cf. Sierra Club v. Costle*, 657 F.2d 298, 394 n. 469 (D.C. Cir. 1981) (discussing Recommendation 74-4 as an approach to defining the administrative record).



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information that the agency has made available for public viewing. The Conference 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, such as certain copyrighted or indecent materials, online. It is a best practice for agencies to describe and note online those 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 and considered by the agency after the close of the comment period but prior to issuance of the final rule.¹²

“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 include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record being certified.¹³ It should also include an index itemizing the contents.¹⁴ Parties often rely on this index in designating portions of the administrative record for judicial review, such as for inclusion in a joint appendix that will be presented to the court. The designated portions of the administrative record then typically serve 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.¹⁵

Some materials in an agency’s rulemaking record may be protected from public disclosure by law or withheld from the public on the basis of agency privilege. For example,

¹² The present recommendation is not limited to disclosures that the APA, as construed in widely followed case law, may require. See *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984) (“[A]t least the most critical factual material that is used to support the agency’s position on review must have been made public in the proceeding . . .”). However, this case law gives agencies an additional reason to provide public disclosure of factual material in some circumstances.

¹³ *Beck Report*, *supra* note 3, at Section IV.A.

¹⁴ *Id.*

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



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protected materials might include classified information, confidential supervisory or business information, or trade secrets. Other materials might be withheld on the basis of privilege, including attorney-client privilege, the attorney work product privilege, and the pre-decisional deliberative process privilege. Agency practices regarding the identification or inclusion of protected or privileged materials in administrative records and their accompanying indices vary.¹⁶ Some agencies do not include or identify deliberative or privileged materials in administrative records for judicial review.¹⁷ Other agencies identify non-disclosed materials specifically in a privilege log provided with the index of the administrative record for judicial review. Agencies have also noted redactions of protected materials in the administrative record for judicial review and moved the court to permit filing of protected materials, or a summary thereof, 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, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review, and that agencies make this policy publicly available.

¹⁶ The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

¹⁷ 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 Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D. C. Cir. 1986) (en banc).



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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.¹⁸ Completion or supplementation of the administrative record for judicial review 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 on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency decisionmaker.¹⁹ Courts may also inquire into allegations that the agency omitted information from the administrative record for judicial review that should have been included.²⁰

Completion or supplementation of the administrative record for judicial review may also be appropriate in other circumstances not addressed in this recommendation. In a previous recommendation, 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.²¹ 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.”²²

¹⁸ See *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1097 (10th 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.”).

¹⁹ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

²⁰ See, e.g., *Cape Cod Hospital v. Sebelius*, 630 F.3d 203, 211-12 (D.C. Cir. 2011); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 139-40 (D.D.C. 2002).

²¹ Recommendation 74-4, *supra* note 5.

²² Administrative Conference of the United States, Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 Fed. Reg. 27,926 (July 2, 1975).



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;
- (c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;
- (d) reports or recommendations of any relevant advisory committees;
- (e) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and
- (f) any other materials considered by the agency during the course of the rulemaking.

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, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke. In addition, it may be prudent not to include some sensitive information online and to note instead 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 paragraph 1, except that agencies need not include materials



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protected from disclosure by law nor materials that the agency has determined are subject to withholding based on appropriate legal standards, including privilege.

Rulemaking Recordkeeping

4. Agencies should begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking. Agencies should include materials considered in preparation of the notice of proposed rulemaking. For example, agencies should include materials received in response to an advance notice of proposed rulemaking or a notice of inquiry, if there is one, and considered in development of the proposed rule. The agency should continue compiling the rulemaking record as long as the rule is pending before the agency.

5. 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.

Public Rulemaking Dockets

6. To the extent practicable, agencies should index public rulemaking dockets for informal rulemaking, at an appropriate level of detail.

Record Preservation

7. The National Archives and Records Administration (NARA) should amend its agency guidance to address 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



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work with NARA to ensure the adequacy of such systems for recordkeeping purposes and the transfer to the National Archives of permanent records. Agencies should review their records schedules in light of developments in electronic records management.

Certification of Administrative Records for Judicial Review

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 for judicial review.

Agency Record Policies and Guidance

10. Agencies should develop a general policy regarding treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review. Agencies should make this policy available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation.

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 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:



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- (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 materials 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 supervisory or 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

12. A reviewing court should afford the administrative record for judicial review a presumption of regularity.

13. In appropriate circumstances, a reviewing court should permit or require supplementation or completion of the record on review. Supplementation or completion may



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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.