



The Administrative Record in Informal Rulemaking

Committee on Judicial Review

Proposed Recommendation | June 13-14, 2013

1 The administrative record in informal rulemaking plays an essential role in informing the
2 public of potential agency action and in improving the public’s ability to understand and
3 participate in agency decisionmaking. As well, the administrative record can be essential to
4 judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which
5 directs courts to “review the whole record or those parts of it cited by a party” to determine
6 whether challenged agency action is lawful.¹ This statutory language was originally understood
7 as referring to formal proceedings. However, the Supreme Court has long interpreted this APA
8 provision as also encompassing the “administrative record” in informal agency proceedings,
9 whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.² This application
10 to informal proceedings has given rise to uncertainty and experimentation as agencies and
11 courts have worked to implement the administrative record concept—at times inconsistently.
12 As a result, confusion has arisen about the compilation and uses of agency rulemaking records
13 maintained internally, public rulemaking dockets, and administrative records for judicial review.

14 The Administrative Conference therefore commissioned a study of federal agencies’
15 current practices in the development of rulemaking records, public rulemaking dockets, and
16 administrative records for judicial review.³ This recommendation and the supporting Report
17 address these concepts in the context of informal agency rulemaking adopted pursuant to the

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, *Development, Compilation, and Judicial Review of Informal Agency Administrative Records* (2013) (report to the Administrative Conference of the United States) [hereinafter Beck Report].



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18 notice-and-comment procedures prescribed in 5 U.S.C. § 553.⁴ The recommendation does not
19 address the record for agency decisions made in other contexts, such as in adjudication, formal
20 rulemaking, or guidance documents.

21 This recommendation builds upon earlier Administrative Conference work in the areas
22 of rulemaking, recordkeeping, and technological developments in managing records.
23 Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of*
24 *General Applicability*, identified the administrative materials that should be available to a court
25 that was evaluating, on preenforcement review, the factual basis for agency rules of general
26 applicability.⁵ That recommendation was receptive to judicial development of the concept of a
27 “record” on review of informal agency rulemakings. In Recommendation 93-4, *Improving the*
28 *Environment for Agency Rulemaking*, the Administrative Conference advised agencies to
29 establish and manage rulemaking files “so that maximum disclosure to the public is achieved
30 during the comment period and so that a usable and reliable file is available for purposes of
31 judicial review.”⁶ A number of Administrative Conference recommendations also have
32 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. 12, 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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33 recently, the Conference examined legal considerations associated with the use of digital
34 technologies in the development and implementation of informal rulemakings.⁸

35 This recommendation synthesizes and updates the Conference's prior
36 recommendations in these areas. It is grounded in empirical research, supported by a survey
37 questionnaire on present agency recordkeeping practices, as well as by a review of existing
38 agency guidance.⁹ The Conference has identified and recommends best practices for all
39 rulemaking agencies in the areas of record compilation, preservation, and certification. The
40 recommendation also advises agencies to develop guidance to aid agency personnel as they
41 compile rulemaking and administrative records and to increase public understanding of agency
42 recordkeeping.

43 Agencies engage in informal rulemaking with differing frequencies, resources, and
44 technological capabilities. Many agencies are in a period of transition, as they move from paper
45 to electronic recordkeeping.¹⁰ Attention to the design of information technology resources that
46 is mindful of the principles and best practices set forth below can aid agencies in
47 recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and
48 more effective judicial review. For the purposes of this recommendation, the rulemaking
49 record, public rulemaking docket, and the administrative record for judicial review are defined
50 as follows:

51 "*Rulemaking record*" means the full record of materials before the agency in an
52 informal rulemaking. The Conference contemplates that, in addition to materials required by

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



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53 law to be included in the rulemaking record, as well as all comments and materials submitted to
54 the agency during comment periods, any material that the agency considered should be
55 included as part of that record.

56 “*Considered*” entails review by an individual with substantive responsibilities in
57 connection with the rulemaking.¹¹ Considered also entails some minimum degree of attention
58 to the contents of a document. Thus, the rulemaking record need not encompass every
59 document that rulemaking personnel encountered while rummaging through a file drawer, but
60 it generally should include a document that was reviewed by an individual with substantive
61 responsibilities in order to evaluate its possible significance for the rulemaking, unless the
62 review disclosed that the document was not germane to the subject matter of the rulemaking.
63 For example, a list of potentially helpful articles compiled by a librarian at the request of an
64 agency official generally does not qualify for inclusion. A document should not be excluded
65 from the rulemaking record on the basis that the reviewer disagreed with the factual or other
66 analysis in the document, or because the agency did not or will not rely on it. Although the
67 concept resists precise definition, the term considered as used in this recommendation should
68 be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can
69 be evaluated and to which the agency and others may refer in the future.

70 “*Public rulemaking docket*” means the public version of the rulemaking record managed
71 by the agency, regardless of location, such as online at Regulations.gov or an agency website or
72 available for physical review in a docket room. The public rulemaking docket includes all
73 information that the agency has made available for public viewing. The Conference also urges
74 agencies to manage their public rulemaking dockets to achieve maximum disclosure to the

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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75 public. However, the Conference recognizes that prudential concerns may limit agencies from
76 displaying some information, such as certain copyrighted or indecent materials, online. It is
77 best practice for agencies to describe and note online those materials that are not displayed
78 but are available for physical inspection. Another agency best practice is to include in the
79 public rulemaking docket materials generated and considered by the agency after the close of
80 the comment period but prior to issuance of the final rule.

81 *“Administrative record for judicial review”* means the materials tendered by the agency
82 and certified to a court as the record on review of the agency’s regulatory action. The
83 administrative record provided to the court will also include an affidavit, made by a certifying
84 official, attesting to the contents and accuracy of the record being certified.¹² It should also
85 include an index itemizing the contents.¹³ Parties often rely on this index in designating
86 portions of the administrative record for judicial review for inclusion in a joint appendix that
87 will be presented to the court. The joint appendix then typically serves as the basis for the
88 court’s review, as provided in the Administrative Procedure Act and as appropriate under the
89 rules of the reviewing court.¹⁴

90 Some materials in an agency’s rulemaking record may be protected from public
91 disclosure by law or withheld from the public on the basis of agency privilege. For example,
92 protected materials might include classified information, confidential supervisory or business
93 information, or trade secrets. Other materials might be withheld on the basis of privilege,
94 including attorney-client privilege, the attorney work product privilege, and the predecisional
95 deliberative process privilege. Agency practices regarding the identification or inclusion of
96 protected or privileged materials in administrative records and their accompanying indices

¹² *Beck Report*, *supra* note 3, at Section IV.A.

¹³ *Id.*

¹⁴ 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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97 vary.¹⁵ Some agencies do not include or identify deliberative and other privileged materials in
98 administrative records for judicial review.¹⁶ Other agencies identify non-disclosed materials
99 specifically in a privilege log provided with the index of the administrative record for judicial
100 review. Agencies have also noted redactions of protected materials in the public administrative
101 record and moved the court to permit filing of protected materials, or a summary thereof,
102 under seal. Many agencies do not have a policy on inclusion of protected or privileged
103 materials in an administrative record for judicial review and manage such materials on a case-
104 by-case basis. Case-by-case consideration may occasionally be necessary, such as when
105 privileged materials are referenced as the basis of the agency's decision. Nonetheless, the
106 Conference recommends that agencies develop a written policy for treatment of protected or
107 privileged materials in certification of the administrative record for judicial review, and that
108 agencies make this policy publicly available.

109 Compilation and preparation of the administrative record for judicial review is properly
110 within the province of the agency and this process should be accorded a presumption of
111 regularity by the reviewing court.¹⁷ Completion or supplementation of the administrative
112 record for judicial review may be appropriate where a strong showing has been made to
113 overcome the presumption of regularity in compilation. For example, courts have permitted
114 limited discovery on the basis of a "strong showing of bad faith or improper behavior" on the

¹⁵ The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

¹⁶ 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).

¹⁷ *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.").



115 part of the agency decisionmaker.¹⁸ Courts may also inquire into allegations that the agency
116 omitted information from the administrative record for judicial review that should have been
117 included.¹⁹

118 Completion or supplementation of the administrative record for judicial review may also
119 be appropriate in other circumstances not addressed in this recommendation. In previous
120 recommendations, the Conference has recognized that the reviewing court should not
121 invariably be confined to the record on review in evaluating the factual basis of a generally
122 applicable rule on preenforcement review.²⁰ The Conference has also acknowledged that, on
123 direct review by courts of appeals, the record on review “can usually be supplemented, if
124 necessary, by means other than an evidentiary trial in a district court.”²¹

RECOMMENDATION

125 **Record Contents**

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

129 (a) notices pertaining to the rulemaking;

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

¹⁸ *Overton Park*, 401 U.S. 402, 420 (1971).

¹⁹ 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).

²⁰ Recommendation 74-4, *supra* note 5.

²¹ 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).



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

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

145 3. *The Administrative Record for Judicial Review.* The administrative record
146 provided to the court on judicial review of informal rulemaking should contain all of the
147 materials in the rulemaking record as set forth in Recommendation 1, except that agencies
148 need not include materials protected from disclosure by law nor materials that the agency has
149 determined are subject to withholding on the basis of privilege.

150 **Rulemaking Recordkeeping**

151 4. Agencies should begin compiling rulemaking records no later than the date on
152 which an agency publishes the notice of proposed rulemaking. Agencies should include
153 materials considered in preparation of the notice of proposed rulemaking. For example,
154 agencies should include materials received in response to an advance notice of proposed
155 rulemaking or a notice of inquiry, if there is one, and considered in development of the



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156 proposed rule. The rulemaking record should remain open as long as the rule is pending before
157 the agency.

158 5. To the extent practicable, agencies should index rulemaking records for informal
159 rulemaking, at an appropriate level of detail, and consistent with legal privileges and the
160 Freedom of Information Act, 5 U.S.C. § 552.

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

166 **Record Preservation**

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

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

176 **Certification of Administrative Records for Judicial Review**

177 9. Agencies should develop procedures for designating appropriate individuals,
178 who may or may not be record custodians, to certify administrative records to the court in case
179 of judicial review of agency action. Agency certifications should include an index of contents of
180 the administrative record for judicial review.



181 **Agency Record Policies and Guidance**

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

186 11. Agencies that engage in informal rulemaking should issue guidance to aid
187 personnel in implementing the above best practices. Agencies should make their guidance on
188 informal rulemaking and administrative recordkeeping available to the public and should
189 provide it to the Department of Justice, if the Department represents the agency in litigation.
190 The level of detail and contents of such guidance will vary based on factors such as: the size of
191 typical agency rulemaking records; institutional experience, or the lack thereof, with record
192 compilation and informal rulemaking litigation; the need for consistency across agency
193 components in the development and maintenance of rulemaking records; and agency
194 resources. However, agencies should ensure that guidance addresses at least the following:

- 195 (a) essential components of the rulemaking record, public rulemaking docket, and
196 the administrative record for judicial review;
- 197 (b) appropriate exclusions from the rulemaking record, including guidance on
198 whether and when to exclude files such as personal notes or draft documents;
- 199 (c) timing of compilation and indexing practices;
- 200 (d) management and segregation of privileged materials, *e.g.*, attorney work
201 product or pre-decisional deliberative materials;
- 202 (e) management and segregation of sensitive or protected materials, *e.g.*,
203 copyrighted, classified, protected personal, or confidential supervisory or business
204 information;



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- 205 (f) policies and procedures, if any, for the protection of sensitive information
206 submitted by the public during the process of rulemaking or otherwise contained in the
207 rulemaking record;
- 208 (g) preservation of rulemaking and administrative records and public rulemaking
209 dockets;
- 210 (h) certification of the administrative record for judicial review, including the
211 process for identifying the appropriate certifying official; and
- 212 (i) relevant capabilities and limitations of recordkeeping tools and technologies.

213 **Judicial Review**

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

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