



The Administrative Record in Informal Rulemaking

Committee on Judicial Review

Proposed Recommendation | June 13-14, 2013

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).

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 differences among these three types of records can be seen from their descriptions below.**

15 The Administrative Conference therefore commissioned a study of federal agencies'
16 current practices in the development of rulemaking records, public rulemaking dockets, and

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).



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17 administrative records for judicial review.³ This recommendation and the supporting Report
18 address these concepts in the context of informal agency rulemaking adopted pursuant to the
19 notice-and-comment procedures prescribed in 5 U.S.C. § 553.⁴ The recommendation does not
20 address the record for agency decisions made in other contexts, such as in adjudication, formal
21 rulemaking, or guidance documents.

22 This recommendation builds upon earlier Administrative Conference work in the areas
23 of rulemaking, recordkeeping, and technological developments in managing records.
24 Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of*
25 *General Applicability*, identified the administrative materials that should be available to a court
26 that was evaluating, on preenforcement review, the factual basis for agency rules of general
27 applicability.⁵ That recommendation was receptive to judicial development of the concept of a
28 “record” on review of informal agency rulemakings. In Recommendation 93-4, *Improving the*
29 *Environment for Agency Rulemaking*, the Administrative Conference advised agencies to
30 establish and manage rulemaking files “so that maximum disclosure to the public is achieved
31 during the comment period and so that a usable and reliable file is available for purposes of
32 judicial review.”⁶ A number of Administrative Conference recommendations also have
33 examined the use of technology in acquiring, releasing, and managing agency records.⁷ Most

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].

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



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

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

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

(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).

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

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

72 “Public rulemaking docket” means the public version of the rulemaking record managed
73 by the agency, regardless of location, such as online at Regulations.gov or an agency website or

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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74 available for physical review in a docket room. The public rulemaking docket includes all
75 information that the agency has made available for public viewing. The Conference also urges
76 agencies to manage their public rulemaking dockets to achieve maximum disclosure to the
77 public. However, the Conference recognizes that prudential concerns may limit agencies from
78 displaying some information, such as certain copyrighted or indecent materials, online. It is
79 best practice for agencies to describe and note online those materials that are not displayed
80 but are available for physical inspection. Another agency best practice is to include in the
81 public rulemaking docket materials generated and considered by the agency after the close of
82 the comment period but prior to issuance of the final rule.¹²

83 “Administrative record for judicial review” means the materials tendered by the agency
84 and certified to a court as the record on review of the agency’s regulatory action. The
85 administrative record provided to the court will also include an affidavit, made by a certifying
86 official, attesting to the contents and accuracy of the record being certified.¹³ It should also
87 include an index itemizing the contents.¹⁴ Parties often rely on this index in designating
88 portions of the administrative record for judicial review, such as for inclusion in a joint appendix
89 that will be presented to the court. The designated portions of the administrative record joint
90 appendix then typically serves as the basis for the court’s review, as provided in the
91 Administrative Procedure Act and as appropriate under the rules of the reviewing court.¹⁵

92 Some materials in an agency’s rulemaking record may be protected from public
93 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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94 protected materials might include classified information, confidential supervisory or business
95 information, or trade secrets. Other materials might be withheld on the basis of privilege,
96 including attorney-client privilege, the attorney work product privilege, and the predecisional
97 deliberative process privilege. Agency practices regarding the identification or inclusion of
98 protected or privileged materials in administrative records and their accompanying indices
99 vary.¹⁶ Some agencies do not include or identify deliberative ~~and or other~~ privileged materials
100 in administrative records for judicial review.¹⁷ Other agencies identify non-disclosed materials
101 specifically in a privilege log provided with the index of the administrative record for judicial
102 review. Agencies have also noted redactions of protected materials in the ~~public administrative~~
103 ~~record for judicial review~~ and moved the court to permit filing of protected materials, or a
104 summary thereof, under seal. Many agencies do not have a policy on inclusion of protected or
105 privileged materials in an administrative record for judicial review and manage such materials
106 on a case-by-case basis. Case-by-case consideration may occasionally be necessary, such as
107 when privileged materials are referenced as the basis of the agency's decision. Nonetheless,
108 the Conference recommends that agencies develop a written policy for treatment of protected
109 or privileged materials in certification of the administrative record for judicial review, and that
110 agencies make this policy publicly available.

Comment [CMA1]: Morrison Amendment:
Proposed move of footnote text to beginning of
next footnote.

111 Compilation and preparation of the administrative record for judicial review is properly
112 within the province of the agency and this process should be accorded a presumption of
113 regularity by the reviewing court.¹⁸ Completion or supplementation of the administrative

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).~~

¹⁸ ~~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).~~ See *also* *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 1985) ("designation of



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114 record for judicial review may be appropriate where a strong showing has been made to
115 overcome the presumption of regularity in compilation. For example, courts have permitted
116 limited discovery on the basis of a “strong showing of bad faith or improper behavior” on the
117 part of the agency decisionmaker.¹⁹ Courts may also inquire into allegations that the agency
118 omitted information from the administrative record for judicial review that should have been
119 included.²⁰

120 Completion or supplementation of the administrative record for judicial review may also
121 be appropriate in other circumstances not addressed in this recommendation. In previous
122 recommendations, the Conference has recognized that the reviewing court should not
123 invariably be confined to the record on review in evaluating the factual basis of a generally
124 applicable rule on preenforcement review.²¹ The Conference has also acknowledged that, on
125 direct review by courts of appeals, the record on review “can usually be supplemented, if
126 necessary, by means other than an evidentiary trial in a district court.”²²

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 *Overton Park*, 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

127 **Record Contents**

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

131 (a) notices pertaining to the rulemaking;

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

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

136 (d) reports or recommendations of any relevant advisory committees;

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

139 (f) any other materials considered by the agency during the course of the
140 rulemaking.

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

Comment [CMA2]: Siciliano Amendment

147 3. *The Administrative Record for Judicial Review.* The administrative record
148 provided to the court on judicial review of informal rulemaking should contain all of the



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149 materials in the rulemaking record as set forth in **Recommendation paragraph 1**, except that
150 agencies need not include materials protected from disclosure by law nor materials that the
151 agency has determined are subject to withholding based on appropriate legal standards,
152 including the basis of privilege.

Comment [CMA3]: Siciliano Amendment

153 Rulemaking Recordkeeping

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

161
162 ~~5. To the extent practicable, agencies should index rulemaking records for informal~~
163 ~~rulemaking, at an appropriate level of detail, and consistent with legal privileges and the~~
164 ~~Freedom of Information Act, 5 U.S.C. § 552.~~

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

170 Public Rulemaking Dockets

171 6. To the extent practicable, agencies should index public rulemaking dockets for
172 informal rulemaking, at an appropriate level of detail, and consistent with legal privileges and
173 the Freedom of Information Act, 5 U.S.C. § 552.

Comment [CMA4]: Siciliano Amendment



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174 **Record Preservation**

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

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

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

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

189 **Agency Record Policies and Guidance**

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

194 11. Agencies that engage in informal rulemaking should issue guidance to aid
195 personnel in implementing the above best practices. Agencies should make their guidance on
196 informal rulemaking and administrative recordkeeping available to the public and should
197 provide it to the Department of Justice, if the Department represents the agency in litigation.
198 The level of detail and contents of such guidance will vary based on factors such as: the size of



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

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

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

207 (c) timing of compilation and indexing practices;

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

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

213 (f) policies and procedures, if any, for the protection of sensitive information
214 submitted by the public during the process of rulemaking or otherwise contained in the
215 rulemaking record;

216 (g) preservation of rulemaking and administrative records and public rulemaking
217 dockets;



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

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

221 **Judicial Review**

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

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