

REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**PROTECTED MATERIALS IN PUBLIC RULEMAKING
DOCKETS**

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This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).

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Abstract

Agencies conducting informal rulemaking proceedings increasingly confront conflicting duties with respect to protected materials included in information submitted in public rulemaking dockets. They must reconcile the broad commitment to openness and transparency reflected in federal law with the duty to protect confidential business information (CBI) and personally identifiable information (PII) against improper disclosure.

This report presents an analysis of how agencies can best balance these often-countervailing considerations. Part I explores the legal duties to disclose and withhold information submitted in public rulemaking dockets placed on agencies by the E-Government Act of 2002, Executive Order No. 13,563, the Administrative Procedure Act, the Government in the Sunshine Act, the Privacy Act of 1974, the Trade Secrets Act, and the Freedom of Information Act. It also examines judicial decisions and other legal interpretations regarding the proper way to tradeoff these opposing concerns.

Part II explores current agency practices with respect to protected materials. The assessment of agency practices is based on a survey of notices of proposed rulemaking (NPRMs) and system of records notices (SORNs) issued by agencies and their web portals accepting comments on rulemaking proceedings as well as interviews and a roundtable with agency officials and a survey sent to agencies. All survey answers or interviews are reported confidentially.

Part III combines the legal analysis and the assessment of agency practices to make a series of recommendations regarding possible changes to NPRMs, web portals, and agency guidance and procedures. The recommendations take into account the importance of not imposing unnecessary burdens on agency staff.

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INTRODUCTION

The U.S. government has long embraced a policy of promoting the integration of online services into the rulemaking process. For example, the E-Government Act of 2002 requires agencies to accept submissions electronically and to make dockets publicly available electronically to the greatest extent practicable.¹ In addition, Executive Order No. 13,563 charges agencies with working to enable the public to submit comments through the Internet and to enjoy timely online access to public rulemaking dockets.² Administrative Conference Recommendation 2013-4 similarly calls upon agencies to “manage their public rulemaking dockets to achieve maximum public disclosure.”³

At the same time, the federal government has become increasingly aware of its responsibilities to protect certain types of information submitted during the rulemaking process against disclosure. For example, the Privacy Act of 1974 explicitly acknowledges that the increasing use of computer storage has increased the need to protect personal information held by the federal government against disclosure.⁴ The E-Government Act sounds a similar note when it specifies that online access to government information must be “provide[d] in a manner consistent with laws regarding protection of personal privacy.”⁵ Administrative Conference Recommendation 2013-4 echoes this concern when it advises agencies to “develop a general

¹ Pub. L. No. 107-347, § 206(c), (d)(1)–(2), 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).

² Exec. Order No. 13,563, § 2(a)–(b), 3 C.F.R. § 215 (2012), *reprinted in* 76 Fed. Reg. 3,821 (Jan. 18, 2011), *and* 5 U.S.C. § 601 app. at 836–37 (2018).

³ Administrative Conference Recommendation 2013-4: The Administrative Record in Informal Rulemaking 8 ¶ 2, ADMIN. CONF. U.S. (June 14, 2013), https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf.

⁴ Pub. L. No. 93-579, § 2(a)(2), (a)(5), 88 Stat. 1896, 1896, *reprinted in* 5 U.S.C. § 552a app. at 790 (2018).

⁵ § 2(b)(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

policy regarding treatment of protected or privileged materials,” and disclose those policies to the public.”⁶ The Recommendation further advises agencies to “issue guidance to aid personnel in implementing the above best practices,” addressing, among other things, “management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential supervisory or business information” and “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.”⁷

This report examines the relevant legal obligations and current agency practices to offer an assessment of the best way to achieve both of these considerations simultaneously. Part II details the competing statutory obligations to disclose and withhold applicable to agencies performing informal rulemaking and examines the judicial precedent considering how to strike the proper balance between these two opposing considerations. Part III analyzes current agency practices with respect to disclosure and withholding as reflected in current notices of proposed rulemaking (NPRMs), system of record notices (SORNs), disclosures contained in online portals for submitting comments in rulemaking proceedings, and a survey circulated to agencies. Part III offers a series of recommendations based on the preceding legal and empirical analysis. Part IV concludes.

⁶ Administrative Conference Recommendation 2013-4, *supra* note 3, at 10 ¶ 10.

⁷ *Id.* at 10–11 ¶ 11(e)–(f).

I. LEGAL DUTIES TO DISCLOSE AND WITHHOLD PROTECTED MATERIALS SUBMITTED IN PUBLIC RULEMAKING DOCKETS

The administrative agencies of the United States are obligated to comply with numerous and occasionally conflicting legal obligations with respect to disclosure of information submitted during the rulemaking process. On the one hand, acts such as the E-Government Act of 2002, the Freedom of Information Act (FOIA), and the Government in the Sunshine Act mandate openness and disclosure from federal agencies. On the other hand, the Privacy Act and the enumerated exemptions of FOIA charge agencies with a duty to keep certain personally identifiable information (PII) and confidential business information (CBI) away from public view. When administrative agencies make decisions regarding what should and should not be disclosed, they must balance these competing statutes.

A. Legal Duties to Disclose Information

Four sources of law directly govern agencies' direct duties to disclose information during the rulemaking process: The E-Government Act, Executive Order No. 13,563, the Administrative Procedure Act, and the Government in the Sunshine Act. The Freedom of Information Act (FOIA) has an indirect effect on agency disclosure during the rulemaking process by providing for an independent cause of action that allows citizens to obtain access to information submitted during the rulemaking process.

1. The E-Government Act of 2002

Congress enacted the E-Government Act “[t]o enhance the management and promotion of electronic Government services and processes” and “to enhance citizen access to Government

information and services.”⁸ The statute specified eleven purposes, 9 devoted to “improving government efficiency, organization, and decision-making”⁹ and 2 devoted “[t]o provid[ing] increased opportunities for citizen participation in Government” and “[t]o mak[ing] the Federal Government more transparent and accountable.”¹⁰

To effectuate these goals, Section 206 of the E-Government Act provides that “[t]o the extent practicable, agencies shall accept submissions” in response to an NPRM “by electronic means.”¹¹ In addition, “[t]o the extent practicable, as determined by the agency in consultation with the Director [of the Office of Management and Budget (OMB)], agencies shall ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings” under the APA.¹² These “[a]gency electronic dockets shall make publicly available online” “all submissions” in response to an NPRM and “other material that by agency rule or practice are included in the rulemaking docket,” again “[t]o the extent practicable as determined by the agency and the Director.”¹³

2. *Executive Order No. 13,563*

Executive Order No. 13,563, “Improving Regulation and Regulatory Review,” imposed a number of requirements designed “to improve regulation and regulatory review.”¹⁴ Section 1

⁸ 116 Stat. at 2899.

⁹ *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Commerce*, 928 F.3d 95, 98 (D.C. Cir. 2019). For these purposes, see § 2(b)(1), (b)(3)–(8), (b)(10)–(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

¹⁰ § 2(b)(2), (b)(9), 116 Stat. at 2901.

¹¹ § 206(c), 116 Stat. at 2916 (codified at 44 U.S.C. § 3501 note).

¹² § 206(d)(1), 116 Stat. at 2916.

¹³ § 206(d)(2), 116 Stat. at 2916.

¹⁴ Exec. Order No. 13,563, 3 C.F.R. § 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 836–37 (2018).

establishes “public participation and an open exchange of ideas” as one of the “General Principles of Regulation.”¹⁵

Section 2 provides that “[r]egulations shall be adopted through a process that involves public participation” and “shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines affected stakeholders in the private sector, and the public as a whole.”¹⁶ To effectuate these goals, “each agency . . . shall endeavor to provide the public with an opportunity to participate in the regulatory process” and “shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation.”¹⁷ In addition, “each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov . . . in an open format that can be easily searched and downloaded.”¹⁸ Furthermore, “such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket.”¹⁹

3. *The Administrative Procedure Act*

The Administrative Procedure Act (APA) provides additional statutory guidance as to what must be made public during a rulemaking. Section 553 requires agencies to publish NPRMs in the *Federal Register*²⁰ and give interested persons the opportunity to participate in the rulemaking process by submitting comments about the proposed rule.²¹ Moreover, “[a]fter

¹⁵ *Id.* § 1.

¹⁶ *Id.* § 2(a).

¹⁷ *Id.* § 2(b).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 5 U.S.C. § 553(b).

²¹ *Id.* § 553(c).

consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”²²

Courts have recognized the critical role that comments and the required responses to them in the statement of basis and purpose play in making clear “what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”²³ The “degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations” is what justifies “entrust[ing] the Agency with wide-ranging regulatory discretion.”²⁴ In *Portland Cement*, the District of Columbia Circuit held that during rule-making proceedings, an agency cannot “promulgate rules on the basis of . . . data that, to a critical degree, is known only to the agency,”²⁵ nor can an agency promulgate rules without identifying the methodology behind their tests.²⁶

The D.C. Circuit has noted how agencies depend on “an exchange of views, information, and criticism between interested persons and the agency” and “a dialogue among interested parties through provisions for comment, reply-comment, and subsequent oral argument” to inform their decisionmaking.²⁷ That is why the Supreme Court has observed that “the notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation”²⁸ and why the Court regards having undergone the notice-and-comment process as

²² *Id.*

²³ *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); *accord* *U.S. v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (quoting this language from *Boyd* with approval).

²⁴ *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978); *accord id.* at 1027–28 (noting that “the degree of openness, explanation, and participatory democracy required by the APA” is what “negate[s] the dangers of arbitrariness and irrationality in the formulation of rules” (quoting *Boyd*, 407 F.2d at 308)).

²⁵ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 326 (D.C. Cir. 1973).

²⁶ *Id.* at 325.

²⁷ *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 36, 55 (1977); *accord* David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 *IND. L.J.* 101, 107–08 (1976) (noting how the “system of peer review and oversight” provided by the notice-and-comment process plays a key role in improving agency decisionmaking).

²⁸ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

a key consideration when determining when an agency's decision will receive *Chevron* deference.²⁹

In addition to the direct obligations imposed by 5 U.S.C. § 553, the judicial review provisions contained in the APA also have an effect on agency disclosure. Section 706 of the APA authorizes courts to “hold unlawful or set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³⁰ The statute further requires that courts conduct their review on the basis of “the whole record.”³¹ Courts have held that “[t]he whole record in an informal rule-making case” includes “comments received.”³² Failure to gather and disclose comments can be a basis for granting a petition for review.³³ In addition, giving others the opportunity to respond to arguments raised in comments or hearings is “salutary” if not strictly required and makes it more likely that the court will have the full range of points of view necessary to conduct proper judicial review.³⁴

4. *The Government in the Sunshine Act*

The Government in the Sunshine Act “declare[s it] to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.”³⁵ As the Senate Report observed, the statute was designed to ensure that the “government should conduct the public’s business in public.”³⁶ It is

²⁹ *United States v. Mead*, 533 U.S. 218, 229 (2001).

³⁰ 5 U.S.C. § 706(2)(A).

³¹ *Id.* § 706.

³² *Rodway*, 514 F.2d at 817; accord Administrative Conference Recommendation 2013-4, *supra* note 3, at 4, 8¶ 1.

³³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *U.S. Lines, Inc. v. Fed. Maritime Comm’n*, 584 F.2d 519, 535 (D.C. Cir. 1978); *Rodway v. Dep’t of Agric.*, 514 F.2d 809, 816–17 (D.C. Cir. 1975).

³⁴ *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

³⁵ Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (1976).

³⁶ S. REP. NO. 94-354, at 1 (1975); see also H.R. REP. NO. 94-880, at 2–4 (1976), reprinted in 1976 U.S.C.C.A.N. 2183.

based on the belief that “increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government,” ultimately “mak[ing] government more fully accountable to the people.”³⁷

As a result, the Sunshine Act requires that agency members generally “jointly conduct or dispose of agency business” through meetings that are “open to public observation.”³⁸ The Act went beyond FOIA by omitting a deliberative process exemption and thereby extending transparency requirements to predecisional deliberations.³⁹

At the same time, the need “to provide the public with such information” must be balanced against “protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”⁴⁰ As a result, the open meeting obligations of the Sunshine Act are subject to a number of statutory exemptions.⁴¹

5. *The Freedom of Information Act (FOIA)*

Though FOIA does not *directly* regulate disclosure during the rulemaking process, it does provide an independent cause of action that any person can use to require agencies to disclose information obtained during the rulemaking process. FOIA encourages openness by requiring agencies to release all records, information, and documents that are not covered by specific exemptions.⁴² Not only does it require disclosure of rules of procedure, opinions, interpretations, and statements of policy in the *Federal Register*; it mandates that “each agency, upon any

³⁷ *Common Cause v. Nuclear Regulatory Comm’n*, 674 F.2d 921, 928 (D.C. Cir. 1982).

³⁸ 5 U.S.C. § 552b(b).

³⁹ *Common Cause*, 674 F.2d at 929.

⁴⁰ § 2, 90 Stat. at 1241.

⁴¹ 5 U.S.C. § 552b(c).

⁴² *Id.* § 552.

request for records . . . shall make the records promptly available to any person” so long as the request reasonably describes such records and “is made in accordance with published rules . . . and procedures.”⁴³

The Supreme Court has long recognized that FOIA is “[w]ithout question . . . broadly conceived” and “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”⁴⁴ The hope is that more fulsome disclosure will “pierce the veil of administrative secrecy and . . . open agency action to the light of public scrutiny.”⁴⁵ Such transparency will lead to better decisionmaking and “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁴⁶

B. Legal Duties to Withhold Information

At the same time that some statutes require agencies to make information related to agency activity widely available, other statutes and even other sections of same statutes mentioned above charge agencies with a duty to keep certain CBI and PII from public view: the Privacy Act of 1974, the privacy provisions of the E-Government Act of 2002, the Trade Secrets Act, and the exemptions to the Sunshine Act and FOIA.

These statutes and the case law behind them can provide agencies with useful guidance as to what should be disclosed and what should be withheld during the rulemaking process.

⁴³ *Id.* § 552(a)(3).

⁴⁴ *EPA v. Mink*, 410 U.S. 73, 80 (1973).

⁴⁵ *Dep’t of Air Force v. Rose* 425 U.S. 352, 361 (1976) (quoting the decision below with approval).

⁴⁶ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Particularly important are the judicial decisions determining what should be disclosed under FOIA exemptions 4 and 6.

1. The Privacy Act of 1974

The preamble of the Privacy Act reflects the concern that the growing use of computers may have an adverse effect on individual privacy. The findings state that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies” and that “the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur.”⁴⁷ As a result, “it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.”⁴⁸

The statute’s purpose is “to provide certain safeguards for an individual against an invasion of personal privacy” by, among other things, “permit[ting] an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent” and “permit[ting] exemptions . . . only in those cases where there is an important public policy need for such exemption as has been determined by the specific statutory authority.”⁴⁹ As the Supreme Court has noted, the Privacy Act represents Congress’s recognition that “a strong privacy interest inheres in the nondisclosure of compiled computerized information.”⁵⁰

⁴⁷ Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(1)–(2), 88 Stat. 1896, 1896, *reprinted in* 5 U.S.C. § 552a app. at 790 (2018); *accord* H.R. REP. NO. 93-1416, at 7 (1974) (reporting that “[t]he Privacy Act was passed largely out of concern over “the impact of computer data banks on individual privacy.”).

⁴⁸ § 2(a)(5), 88 Stat. at 1896.

⁴⁹ *Id.* § 2(b)(2) & (5).

⁵⁰ U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 766 (1989).

The statute prohibits agencies from “disclos[ing] any record which is contained in a system of records . . . to any person, or to another agency” without the “prior written consent of, the individual to whom the record pertains.”⁵¹ The statute defines a “record” as:

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.⁵²

This contrasts with “statistical records,” which are records used “for statistical research or reporting purposes only” and “not used . . . in making determination about an identifiable individual.”⁵³

A system of records is a “a group of records . . . from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”⁵⁴ The statute requires all agencies that maintain a system of records to publish a system of records notice (SORN) in the *Federal Register* providing notice to the public of, among other things, the name and location of the system, “categories of individuals on whom records are maintained,” the types of records maintained in the system, and agency procedures where an individual can be notified to change his record.⁵⁵ In addition, the statute requires every agency that maintains a system of records to “establish . . . safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or

⁵¹ 5 U.S.C. § 552a(b).

⁵² *Id.* at § 552a(a)(4).

⁵³ *Id.* at § 552a(a)(6).

⁵⁴ *Id.* § 552a(a)(5).

⁵⁵ *Id.* § 552a(e)(4).

hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.”⁵⁶

The Privacy Act’s duty to withhold information is subject to a number of statutory exemptions, including an explicit exemption for disclosures mandated under FOIA.⁵⁷ The Privacy Act provides individuals with a private right of action to enforce any violations of its terms⁵⁸ which allows aggrieved plaintiffs to recover “actual damages.”⁵⁹

2. *The E-Government Act of 2002*

In addition to the provisions of the E-Government Act requiring agencies to “modernize and regulate the government’s use of information technology,” the statute contains other provisions balancing that interest against the need to protect the privacy interests of individuals.⁶⁰ Among E-Government Act’s stated purposes is “provid[ing] enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.”⁶¹

To strike the appropriate balance, Section 208 of the E-Government Act (“Privacy Provisions”) has the stated purpose of “ensur[ing] sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.”⁶² It requires agencies that are “developing or procuring information technology” or “initiating a new

⁵⁶ *Id.* § 552a(e)(10).

⁵⁷ *Id.* § 552a(b)(2).

⁵⁸ *Id.* § 552a(g)(1).

⁵⁹ *Id.* § 552a(g)(4)(A); *accord* *Doe v. Chao*, 540 U.S. 614 (2004).

⁶⁰ *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Commerce*, 928 F.3d 95, 98 (D.C. Cir. 2019).

⁶¹ § 2(b)(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

⁶² § 208(a), 116 Stat. at 2921 (codified at 44 U.S.C. § 3501 note).

collection of information” to conduct “privacy impact assessments” that are reviewed the agency’s Chief Information Officer and made publicly available.⁶³ Agencies typically completed these privacy impact assessments when they switched to using Regulations.gov to collect comments.⁶⁴ The statute further requires the OMB Director to develop guidelines for privacy notices on agency websites.⁶⁵ Courts have observed that, unlike FOIA, “Section 208 was not designed to vest a general right to information in the public. Rather, the statute was designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making.”⁶⁶ Thus, Section 208 does not create a private right of action.⁶⁷

The E-Government Act also contains provisions regarding the protection of personal information contained in court filings that, while not directly applicable, may provide useful guidance regarding practices to protect privacy interests. Section 205 provides that “the Supreme Court shall prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically” and authorized the Judicial Conference to issue interim rules.⁶⁸ “To the extent that such provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained

⁶³ *Id.* § 208(b)(1)(A)(i)–(ii), (b)(1)(B); *see also* OFF. OF MGMT. & BUDGET, OMB GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 (2003).

⁶⁴ For an example of a Privacy Impact Assessment, *see* U.S. ENVTL. PROT. AGENCY, PRIVACY IMPACT ASSESSMENT FOR THE FEDERAL DOCKET MANAGEMENT SYSTEM/ERULEMAKING (2012), *available at* https://www.epa.gov/sites/production/files/2014-03/documents/erulemaking-pia_0.pdf.

⁶⁵ § 208(c), 116 Stat. at 2923.

⁶⁶ *Elec. Privacy Info. Ctr.*, 928 F.3d at 103.

⁶⁷ *See, e.g., Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 315 (D.D.C. 2017).

⁶⁸ *Id.* § 205(c)(3)(A)(i), (c)(3)(B)(i), 116 Stat. at 2914 (codified at 44 U.S.C. § 3501 note).

by the court as part of the record.”⁶⁹ The Court fulfilled this responsibility through additions to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Bankruptcy Procedure, and rules adopted by specialized courts.⁷⁰

The implementation of Section 205 required the Supreme Court to use its authority to “prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.”⁷¹ The rules of civil procedure, criminal procedure, and bankruptcy procedure and the rules adopted by specialized courts created to fulfill this responsibility follow largely the same form. All of these rules provide that electronic or paper filings “contain[ing] an individual’s social security number, taxpayer-identification number, birthday, name of an individual known to be a minor, a financial account number, or home address of an individual” may include only:

- the last four digits of the social-security number and taxpayer-identification number;
- the year of the individual’s birth;
- the minor’s initials; and
- the last four digits of the financial-account number.⁷²

The Federal Rules of Criminal Procedure also permit the inclusion of a fifth type of information: “the city and state of the home address.”⁷³ For Social Security and immigration cases, electronic access is limited to the parties and their attorneys, with others having to consult the full record at the courthouse.⁷⁴ The obligation to redact applies even when individuals whose

⁶⁹ *Id.* § 205(c)(3)(A)(iv).

⁷⁰ FED. R. CIV. P. 5.2; FED. R. CRIM. P. 49.1; FED. R. BANKR. P. 9037; FED. CL. R. 5.2; CT. INT’L TRADE R. 5.2.

⁷¹ § 205(c)(3), 116 Stat. at 2914 (codified at 44 U.S.C. § 3501 note).

⁷² FED. R. CIV. P. 5.2(a); FED. R. CRIM. P. 49.1(a)(1)–(4); FED. R. BANKR. P. 9037(a); FED. CL. R. 5.2(a); CT. INT’L TRADE R. 5.2(a).

⁷³ FED. R. CRIM. P. 49.1(a)(5).

⁷⁴ FED. R. CIV. P. 5.2(c) (establishing this rule for Social Security appeals and immigration cases); FED. R. CRIM. P. 49.1(c) (providing that immigration cases be governed by Federal Rule of Civil Procedure 5.2).

PII is included in the filing have not requested redaction and may not even be aware of the filing.⁷⁵

The rule provides a few exemptions where redaction is not necessary, including the “record of an administrative or agency proceeding.”⁷⁶ People making the filing have the option to file an unredacted copy under seal.⁷⁷ Courts may also “order that a filing be made under seal without redaction,” “require redaction of additional information” or “limit or prohibit a nonparty’s remote electronic access to a document filed with the court.”⁷⁸ The Advisory Committee for the Federal Rules of Criminal Procedure noted that it was wary of attempts to fully seal the records.⁷⁹

3. *The Trade Secrets Act*

In contrast to the other statutes already discussed in this section, which protect PII, the Trade Secrets Act guards against the disclosure of CBI. This provision was initially enacted in 1864 to prevent revenue officials from “divulg[ing] . . . the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of official duties.”⁸⁰ It was amended in 1930 to refer directly to “trade secrets or processes”⁸¹ and was consolidated in 1948 with similar provisions applying to the Tariff Commission and the U.S. Department of Commerce (DOC) to form a single provision covering all federal officials.⁸²

⁷⁵ Cline v. Ballard, 528 F. Supp. 2d 634, 636 (S.D. W.Va. 2007).

⁷⁶ FED. R. CIV. P. 5.2(b)(2); FED. R. CRIM. P. 49.1(b)(2); FED. R. BANKR. P. 9037(b)(2); ; FED. CL. R. 5.2(b)(2).

⁷⁷ FED. R. CIV. P. 5.2(f); FED. R. CRIM. P. 49.1(f); FED. R. BANKR. P. 9037(e); FED. CL. R. 5.2(f); CT. INT’L TRADE R. 5.2(d).

⁷⁸ FED. R. CIV. P. 5.2(d)–(e); FED. R. CRIM. P. 49.1(d)–(e); FED. R. BANKR. P. 9037(c)–(d); ; FED. CL. R. 5.2(d)–(e); CT. INT’L TRADE R. 5.2(b)(c).

⁷⁹ FED. R. CRIM. P. 49.1, advisory committee’s note; *accord* Crossman v. Astrue, 714 F. Supp. 2d 284, 290 (D. Conn. 2009).

⁸⁰ Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238.

⁸¹ Tariff Act of 1930, ch. 497, § 335, 46 Stat. 590, 701.

⁸² Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683, 791.

The Trade Secrets Act makes it a federal crime for federal officers or employees to “publish[], divulge[], disclose[], or make[] known in any manner” information “concern[ing] or relat[ing] to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association” that they come across during the course of their official duties.⁸³ Importantly, this prohibition applies only to disclosures “not authorized by law.”⁸⁴ The Trade Secrets Act does not create a private right of action.⁸⁵

4. *The Sunshine Act Exemptions*

The Sunshine Act, like other statutes mentioned, contains several exemptions. Specifically, Exemption 4 authorizes the withholding of “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” and Exemption 6 allows the withholding of “information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁸⁶ The language of these exemptions mirror the FOIA exemptions discussed below.

5. *The FOIA Exemptions*

The Supreme Court has recognized that “[a]t the same time that a broad philosophy of ‘freedom of information’ is enacted into law, it is necessary to protect certain equally important

⁸³ 18 U.S.C. § 1905.

⁸⁴ *Id.*

⁸⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 316–17 (1979).

⁸⁶ 5 U.S.C. § 552b(c)(4) & (6).

rights of privacy with respect to certain information in Government files.”⁸⁷ Thus, to protect the “legitimate governmental and private interests could be harmed by release of certain types of information,”⁸⁸ FOIA includes nine specific exemptions delineating circumstances under which disclosure can be refused.⁸⁹

The existence of these exemptions should “not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”⁹⁰ Accordingly, the statute specifies that these exemptions are comprehensive⁹¹ and that “the burden is on the agency to sustain its action.”⁹² To further promote disclosure, the Supreme Court has approved of establishing discrete categories of exempt information, as opposed to a case by case analysis.⁹³ FOIA is thus a “scheme of categorical exclusion” that does “not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.”⁹⁴ And the Supreme Court has repeatedly emphasized that the categories created by these exemptions “must be narrowly construed,”⁹⁵ thought it cannot “arbitrarily restrict” exemptions by adding additional limitations not found within the language of FOIA.⁹⁶

⁸⁷ S. REP. NO. 89-813, at 3 (1965).

⁸⁸ *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

⁸⁹ 5 U.S.C. § 552(b)(1)–(9).

⁹⁰ *Rose*, 425 U.S., at 361.

⁹¹ 5 U.S.C. § 552(d) (noting in the Act should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated”).

⁹² *Id.* § 552(a)(4)(B).

⁹³ *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 799 (1989).

⁹⁴ *Abramson*, 456 U.S. at 631.

⁹⁵ *Id.* at 630; *Rose*, 425 U.S. at 361.

⁹⁶ *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

a. *Exemption 4*

Exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁹⁷ The Senate Committee on the Judiciary stated that Exemption 4 would cover “business sales statistics, inventories, customer lists, and manufacturing processes” and “information which is given to an agency in confidence, since a citizen must be able to confide in his Government.”⁹⁸ “[W]here the Government has obligated itself in good faith not to disclose documents or information which it receives,” they declared, “it should be able to honor such obligations.”⁹⁹ As explored below in section I.C.6, the Supreme Court recently clarified some of these obligations in *Argus Leader*.

In 1987, President Reagan issued Executive Order 12,600, which required all agencies subject to FOIA to promulgate regulations to give certain procedural protections to those submitting “confidential commercial information.”¹⁰⁰ In particular, agency heads must establish procedures to allow the submitters of confidential commercial information to designate what information would cause the submitted “substantial competitive harm” if disclosed.¹⁰¹ If such information is FOIA requested, the agency must then notify the submitter.¹⁰² Notably, however, the notice requirements need not be followed if “the information has been published or has been officially made available to the public” or if “the information requested is not designated by the submitter as exempt from disclosure” even though the submitter had an opportunity to do so.¹⁰³

⁹⁷ 5 U.S.C. § 552(b)(4).

⁹⁸ S. REP. NO. 89-813, at 44 (1965).

⁹⁹ *Id.*

¹⁰⁰ Exec. Order No. 12,600, 3 CFR 235 (1987).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

b. Exemption 6

Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁰⁴ The primary purpose of Exemption 6, as indicated by the legislative history, was “to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”¹⁰⁵ Though Exemption 6 explicitly refers to types of files, the Court has also held that “Exemption 6’s protection is not determined merely by the nature of the file containing the requested information.”¹⁰⁶ Information should not lose the protection of Exemption 6 merely because they are stored in different types of files than personnel and medical.¹⁰⁷

For information to be exempted from FOIA under Exemption 6, it must be included in personnel, medical, or “similar files.”¹⁰⁸ Similar files includes “government records on an individual which can be identified as applying to that individual.”¹⁰⁹ This includes email addresses.¹¹⁰ If the information is contained within a “similar file,” courts then consider whether or not the disclosure would amount to an “unwarranted invasion of privacy.”¹¹¹

C. Interpretive Decisions Balancing the Duties to Disclose and Withhold

The foregoing sections underscore the legal duties to disclose and withhold information that agencies overseeing the rulemaking process must take into account. Fortunately, judicial

¹⁰⁴ 5 U.S.C. § 552(b)(6).

¹⁰⁵ U.S. Dep’t of State v. Wash. Post, 456 U.S. 595, 595 (1982).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 5 U.S.C. § 552(b)(6).

¹⁰⁹ Prechtel v. FCC, 330 F. Supp. 3d 320, 329 (D.D.C. 2018).

¹¹⁰ *Id.*

¹¹¹ U.S. Dep’t of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994).

decisions interpreting these legal obligations provide useful insights into how to strike the proper balance between these two considerations.

I. Decisions Under the Privacy Act

The Supreme Court has noted that the Privacy Act reflects “Congress’ basic policy concern regarding the implications of computerized data banks for personal privacy.”¹¹² Four aspects of Privacy Act jurisprudence help inform the scope of agencies’ duties to disclose or withhold personal information submitted in rulemaking processes.

a. Records

Judicial interpretation of what constitutes “records” protected by the statute provides insights into what types of information agencies should protect. The Supreme Court has never provided any guidance as to what constitutes a record for purposes of the Privacy Act, although it has stated without elaboration that addresses are records¹¹³ and has accepted the government’s concession that the disclosure of Social Security numbers without consent violated the Privacy Act.¹¹⁴

Lower courts have taken a variety of approaches to construing what constitutes a record. Some courts have construed the term narrowly. For example, the D.C. Circuit has parsed the definition of record carefully, holding that the plain language of the statute requires that the record contain “information *about* an individual . . . and that contains his name” or other identifying information to conclude that the statute requires that information be “about” an

¹¹² Reporters Comm. for Free Press, 489 U.S. at 766.

¹¹³ *U.S. Dep’t of Def.*, 510 U.S. at 494.

¹¹⁴ *Doe v. Chao*, 540 U.S. 614, 617 (2004).

individual in order to be a record.¹¹⁵ If simply containing a person’s name or address were sufficient, the first clause would be surplusage.¹¹⁶ The Ninth and Eleventh Circuits have held (without much analysis) that information must reflect some “quality or characteristic” about an individual in order to be a record.¹¹⁷

Other courts have construed the term broadly.¹¹⁸ The Third Circuit has held that the term record “encompass[es] any information about an individual that is linked to that individual through an identifying particular.”¹¹⁹ The Fourth Circuit has similarly held that “a ‘record’ was meant to ‘include as little as one descriptive item about an individual.’”¹²⁰ The Second Circuit largely agreed with the Third Circuit, holding that records under the Privacy Act include “at the very least, any personal information ‘about an individual that is linked to that individual through an identifying particular’” and specifically rejecting the approaches taken by the D.C., Ninth, and Eleventh Circuits.¹²¹ Regardless of the standard used, courts have held that contact information¹²² and emails¹²³ constitute records under the Privacy Act.

¹¹⁵ *Tobey v. NLRB*, 40 F.2d 469, 471 (D.C. Cir. 1994).

¹¹⁶ *Id.*

¹¹⁷ *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1449 (9th Cir. 1985); *Boyd v. Secretary of the Navy*, 709 F.2d 684, 686 (11th Cir. 1983).

¹¹⁸ *See Williams v. Dep’t of Veterans Affairs*, 104 F.3d 670, 673 (4th Cir. 1997) (“In general, courts have been lenient in determining what information constitutes a “record” within the meaning of the Act.”).

¹¹⁹ *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992).

¹²⁰ *Williams v. Dep’t of Veterans Affairs*, 104 F.3d 670, 674 (4th Cir. 1997) (quoting Analysis of House and Senate Compromise Amendments to the Federal Privacy Act, *reprinted in* LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974: SOURCE BOOK ON PRIVACY 866 (1976)).

¹²¹ *Bechhoefer v. U.S. Dep’t of Justice Drug Enf’t Admin.*, 209 F.3d 57, 60–63 (2d Cir. 2000) (quoting *Quinn*, 978 F.2d at 133).

¹²² *Williams v. Shinseki*, 161 F. Supp. 3d 91, 94 (D.D.C. 2012).

¹²³ *Rivera v. Potter*, 400 F. Supp. 2d 404, 409 (D.P.R. 2005).

b. *System of Records*

The Privacy Act protects only those records contained in a “system of records,” defined as “a group of records . . . from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”¹²⁴

Courts have added three important guideposts for determining what constitutes a system of records. First, information about one individual contained in a record about another individual is not contained in a system of records.¹²⁵ For example, information about Jane Doe contained in a record about John Smith is not a system of records because that information would not be retrieved by Jane Doe’s name unless the agency had “devised and used an indexing capability” where they could search other individuals’ files for her name.¹²⁶

Second, the mere capability of retrieving information about individuals by their name is not sufficient to turn a group of records into a system of records. The agency must follow an actual practice of retrieving information by an individual’s name.¹²⁷ This is an evidentiary standard—to prove there is a system of records, the plaintiff bringing a Privacy Act claim must provide evidence that the agency “*in practice* retrieves information about individuals by reference to their names.”¹²⁸

Third and relatedly, whether a group of records is a system of records depends on whether the agency has gathered the information for the purpose of retrieving information by

¹²⁴ 5 U.S.C. § 552a(a)(5).

¹²⁵ *Baker v. Dep’t of the Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987).

¹²⁶ *Id.*

¹²⁷ *Henke v. U.S. Dep’t of Commerce*, 83 F.3d 1453, 1459–61 (D.C. Cir. 1996); *Baker*, 814 F.2d at 1383–84.

¹²⁸ *Henke*, 83 F.3d at 1461.

name.¹²⁹ On the one hand, a database about individuals compiled by a law enforcement agency for the purpose of investigating crimes that would be routinely queried by name would clearly be a system of records; on the other hand, information contained in applications and reviews gathered to implement a grant-making program would not.¹³⁰ A small number of ad hoc retrievals by name will not necessarily transform a group of records into a system of records, although some level of such retrievals clearly will.¹³¹

To date, no court has directly addressed whether comments submitted in rulemaking processes constitute a system of records, and commentators have split on the issue.¹³² That said, the fact that EPA has previously filed a SORN for Regulations.gov and other agencies have filed SORNs for their systems for managing rulemaking dockets implicitly recognizes that these systems could constitute systems of records for purposes of the Privacy Act.¹³³

c. Consent

The Privacy Act specifically permits disclosure of information with the “prior written consent of[] the individual to whom the record pertains.”¹³⁴

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Compare Daniel F. Solomon, *Save the Social Security Disability Trust Fund! And Reduce SSI Exposure to the General Fund*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 142, 222 (2016) (arguing that rulemaking documents are not systems of records under the Privacy Act), with Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 909 (2011) (arguing that the Federal Docket Management System that provides agency staff with access to content on Regulations.gov is a system of records under the Privacy Act).

¹³³ See *infra* Part II.A.4. Note that in 2019, the General Services Administration took over as the new managing partner of the e-Rulemaking Program, including the Federal Docket Management System and Regulations.gov. While the GSA has filed a SORN related to its new management, the SORN is only for “partner agencies’ users’ names, government issued email addresses, telephone numbers, and passwords as credentials. In addition, users provide their supervisor’s name, telephone number, and government issued email address.” Privacy Act of 1974; System of Records, 84 Fed. Reg. 53,728 (2019). The SORN does not cover any records “pertaining to agency rulemakings.” *Id.*

¹³⁴ 5 U.S.C. § 552a(b).

d. The Exemption for Disclosures Mandated by FOIA

As explained above, the Privacy Act's bar against disclosure contains a number of statutory exemptions. Most importantly, the statute authorizes disclosure when required under FOIA.¹³⁵ For example, while the Privacy Act would generally protect the home addresses of unionized employees that federal agencies like the Department of Defense keep in a system of records, if FOIA mandated disclosure the Privacy Act would no longer protect such information.¹³⁶ Similarly, email addresses collected through commenting websites may be susceptible to FOIA disclosure, even if they would generally be protected by the Privacy Act.

e. Analysis

Together these considerations suggest that the Privacy Act is unlikely to impose any direct constraints or obligations on the way agencies handle personal information contained in comments submitted in public rulemaking dockets. Whether names, addresses, email addresses, and contact information are likely to be considered records arguably depends on which circuit's law applies. That said, repositories of comments are unlikely to constitute systems of records to the extent they are not collected for the purpose of retrieving them by name and are not routinely retrieved by name in practice.

More importantly, other considerations provide a clear path for agencies to avoid any liability under the Privacy Act for any personal information contained in comments submitted in rulemaking procedures. The fact that consent makes any disclosure permissible allows agencies simply to post prominent notices on Regulations.gov or other comment websites explaining that

¹³⁵ *Id.* § 552(b)(2); accord *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 75 (D.C. Cir. 1982).

¹³⁶ See *U.S. Dep't of Def.*, 510 U.S. at 494.

all submitted comments will be made available to the public. In addition, the provision providing that the Privacy Act's prohibitions do not apply to any disclosures mandated by FOIA means that agencies can ensure that they comply with the Privacy Act by complying with the requirements of FOIA, thus effectively eliminating the Privacy Act as an independent source of liability.

2. *Decisions Under the Trade Secrets Act*

A key issue confronting agencies handling CBI is how to balance the Trade Secrets Act's mandate of withholding CBI with FOIA's policy of broad disclosure. The legislative history generated when the Sunshine Act amended FOIA Exemption 3¹³⁷ provides important guidance on how to read these statutes together:

[T]he Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is “not authorized by law,” would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding . . .¹³⁸

This language provides a straightforward way to reconcile these statutes. In the words of the First Circuit, “if the government cannot prove that the requested documents are within FOIA Exemption 4, their disclosure will not violate section 1905. If the documents are found to be exempt from disclosure under the FOIA, they will not be disclosed and no question will arise

¹³⁷ Exemption 3 of FOIA allows withholding of information “prohibited from disclosure by another federal statute” in certain instances. For example, 26 U.S.C. § 6103 prevents the Internal Revenue Services from disclosing certain tax information, including Taxpayer Identification Numbers. *Church of Scientology v. Internal Revenue Services*, 484 U.S. 9, 15 (1987). If a statute either “requires that” matters be withheld with no discretion or “establish particular criteria for withholding or refer[] to particular types of matters to be withheld,” such information is exempt from FOIA. 5 U.S.C. § 552(b)(3). For the purposes of this project, if there is any other type of specific statute *requiring* the withholding of information, such information can be exempt from FOIA requests.

¹³⁸ H.R. REP. NO. 94-880, pt. 1, at. 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2205.

under section 1905.”¹³⁹ The Supreme Court has recognized that the slight differences in the language of the Trade Secrets Act and FOIA Exemption 4 leaves open the “theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905.”¹⁴⁰ The Court noted, however, “that possibility is at most of limited practical significance in view of the similarity of the language between Exemption 4 and the substantive provisions of § 1905.”¹⁴¹

Thus, as was the case with the Privacy Act, an analysis of agencies’ duties under FOIA effectively resolves the scope of the duties to withhold information under the Trade Secrets Act. Information that must be disclosed under FOIA is necessarily not prohibited from disclosure under the Trade Secrets Act.

3. *Decisions Under the Administrative Procedure Act*

As noted above, the APA imposes affirmative obligations on agencies to disclose information. At the same time, courts have recognized the need to balance this obligation against the need to protect CBI.

The D.C. Circuit’s decision in *HBO v. FCC* presented both sides of the balance. On the one hand, the process of “comment, reply-comment, and subsequent oral argument” seen as critical to assuring sound administrative decisionmaking requires that the public have broad access to the comments submitted during rulemaking proceedings.¹⁴² At the same time, the *HBO* court found it “conceivable that trade secrets or information affecting national defense, if proffered as the basis for rulemaking, should be kept secret.”¹⁴³ The Second Circuit, while

¹³⁹ 9 to 5 Org. for Women Off. Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983).

¹⁴⁰ Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979).

¹⁴¹ *Id.*

¹⁴² Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (1977).

¹⁴³ *Id.* at 57 n.130.

recognizing the need for disclosure of the research on which an agency based its rule, also parenthetically recognized “an exception for trade secrets or national security.”¹⁴⁴ A later D.C. Circuit decision was less equivocal: “Of course, an agency may decline to include confidential business information in the public administrative record in certain narrow situations, as long as it discloses as much information publicly as it can.”¹⁴⁵ Consistent with this observation, the Seventh Circuit upheld an agency decision based in part on a spreadsheet locked into a particular configuration so long as it gave commenters reasonable opportunity to engage with the data.¹⁴⁶

These decisions indicate that agencies have some latitude to withhold CBI in appropriate circumstances without violating the APA. Agencies exercising this discretion should strive to disclose as much information as possible and provide sufficient information to permit the public to respond meaningfully to the proposed agency action.

4. *Decisions Under the E-Government Act of 2002*

The E-Government Act of 2002 attempts to strike a balance between the need for openness and disclosure and the need to protect privacy, with a statutory purpose “[t]o provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy.”¹⁴⁷ The lack of a private cause of action means that there are no cases interpreting agencies’ obligations under Section 208 of the Act. The rules that Section 205 required the Supreme Court to issue provide some insight into how the courts would protect certain types of information.¹⁴⁸

¹⁴⁴ U.S. v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977).

¹⁴⁵ Flyers Rights Educ. Fund, Inc. v. FAA, 864 F.3d 738, 745 (D.C. Cir. 2017).

¹⁴⁶ Zero Zone, Inc. v. U.S. Dep’t of Energy, 832 F.3d 654, 670–71 (7th Cir. 2016).

¹⁴⁷ § 2(b)(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

¹⁴⁸ See *supra* notes 71–79 and accompanying text.

Case law applying these rules have held that credit card claimholders may proceed without disclosing “a debtor’s full account number”¹⁴⁹ and precluded disclosure of Social Security numbers under the National Voter Registration Act.¹⁵⁰ Courts have often been hesitant to redact information not listed in the rule. For example, the Court of Federal Claims case granted a request to redact a minor child’s birthdate and to reduce the child’s name to initials, but denied a request to redact all medical information.¹⁵¹

These rules are not binding on agencies. Indeed, the exemption for records of administrative of agency proceedings largely dictates that the contents of public rulemaking dockets largely fall outside their scope. That said, the scope of the judicial redaction requirements can provide useful guidance to agencies attempting to manage the scope of disclosure and withholding in public rulemaking dockets. In particular, it highlights the importance of protecting Social Security numbers, birthdates, financial account numbers, and addresses and the potential benefits of giving those submitting information the option of submitting both public copies and redacted copies under seal.

5. *Decisions Under the Sunshine Act and Its Exemptions*

The Government in the Sunshine Act strikes a balance between openness in government on the one hand and “legitimate governmental and private interests could be harmed by release of certain types of information” on the other.¹⁵² Because the statute proceeds from a strong

¹⁴⁹ *In re* Burkett, 329 B.R. 820, 831 (Bankr. S.D. Ohio 2005).

¹⁵⁰ See Project Vote/Voting For Am., Inc. v. Long, 752 F. Supp. 2d 697, 711–12 (E.D. Va. 2010) (citing the E-Government Act as support for the proposition that “SSNs are uniquely sensitive and vulnerable to abuse, such that a potential voter would understandably be hesitant to make such information available for public disclosure”).

¹⁵¹ Langland *ex rel.* M.L. v. Sec’y of Health & Human Servs., No. 07-36V, 2011 WL 802695, at *10 (Fed. Cl. Feb. 3, 2011).

¹⁵² McKinley v. FDIC, 756 F. Supp. 2d 105, 113 (D.D.C. 2010) (internal quotation marks omitted).

presumption that agency meetings should be held in the open, a meeting can be held in private only if holding it in public would disclose information falling within one of the statutory exemptions, with the agency bearing the burden of proof of showing the need to withhold and with the exemptions being narrowly construed.¹⁵³ Even when one of the exemptions applies, only the portion of the meeting in which that information is disclosed can be held in private, with the remainder of the meeting having to be held in open session.¹⁵⁴

Because the Sunshine Act exemptions are nearly identical to the FOIA exemptions, courts interpret the parallel exemptions in both statutes according to the same principles and have cited judicial precedent interpreting the parallel provision in each statute interchangeably.¹⁵⁵ Thus, as was the case with the Privacy Act and the Trade Secrets Act, interpretation of the Sunshine Act exemptions will likely follow the jurisprudence on the FOIA exemptions.

6. *Decisions Under FOIA and Its Exemptions*

The most instructive body of law to provide interpretive guidance as to how to strike the proper balance between disclosure and withholding is the corpus of judicial opinions interpreting

¹⁵³ *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928–29 (D.C. Cir. 1982); *see also McKinley*, 756 F. Supp. 2d at 113, 115 (construing the Sunshine Act and FOIA exemptions together).

¹⁵⁴ *Common Cause*, 674 F.2d at 929.

¹⁵⁵ *See id.* at 929 & n.21 (noting that

“[i]n general, the Sunshine Act’s exemptions parallel those in the Freedom of Information Act (FOIA)” and that “[o]f the nine exemptions to the Freedom of Information Act, seven are included virtually verbatim in the Sunshine Act”); *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 770 (D.C. Cir. 1978) (holding that the Sunshine Act exemptions and the FOIA exemptions to be *in pari materia*).

On Exemption 4, *see McKinley*, 756 F. Supp. 2d at 114 (noting that “FOIA’s Exemption 4 and the Sunshine Act’s Exemption 4 . . . are identical” and invoking FOIA decisions as precedent in Sunshine Act cases). On Exemption 6, *see Applicability of the Fed. Advisory Comm. Act to Nat’l Endowment for Humanities*, 4B Op. O.L.C. 743, 747 n.8 (1980) (“The balancing analysis required under the Sunshine Act’s privacy exemption, 5 U.S.C. § 552b(c)(6), is essentially similar to that required under the privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), except that the latter, dealing with records involves the additional issue whether a document is the type of ‘file’ covered by the exemption.”).

the FOIA exemptions. In addition, as noted earlier, the proper interpretation of FOIA largely drives the results under the Privacy Act, the Trade Secrets Act, and the Sunshine Act.

The Supreme Court has recognized that FOIA’s “basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’”¹⁵⁶ FOIA’s structure, which provides for a general duty to disclose cabined by strictly limited exemptions, “represents a carefully considered balance between the right of the public to know what their government is up to and the often compelling interest that the government maintains in keeping certain information private.”¹⁵⁷ As a result, FOIA mandates a “strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents.”¹⁵⁸ As noted earlier, the exemptions are considered comprehensive and narrowly construed.

In addition, Congress has “repeated[ly] reject[ed] any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague ‘public interest’ standard.”¹⁵⁹ Instead, the Supreme Court has approved of establishing discrete categories of exempt information, as opposed to determining the scope of particular exemptions on a case-by-case analysis.¹⁶⁰ FOIA is a “scheme of categorical exclusion; it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.”¹⁶¹

In some instances, agencies can still use their discretion to disclose information under FOIA even if such information is covered by an exemption. The application of FOIA exemptions

¹⁵⁶ *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. REP. NO. 89-813, at 3 (1965)).

¹⁵⁷ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53 (1989).

¹⁵⁸ *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

¹⁵⁹ *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 354 (1979).

¹⁶⁰ *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 779 (1989).

¹⁶¹ *Abramson*, 456 U.S. at 631.

is discretionary, not mandatory, and "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."¹⁶² However, agencies may only make a discretionary disclosure "where they are not otherwise prohibited by law from doing so."¹⁶³ As explored above, for Exemption 4, such a legal prohibition would be the Trade Secrets Act; for Exemption 6, the Privacy Act. An agency's ability to use its discretion to disclose information under Exemptions 4 and 6 is disclosed below.

a. Exemption 4

Although the definition of trade secrets is relatively clear, until recently what constitutes "commercial or financial information obtained from a person and privileged or confidential" within the meaning of Exemption 4 was less clear.¹⁶⁴ The Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media* identified two conditions for determining when information is confidential: (1) whether the information is "closely held" in that it is not shared freely and (2) whether it is disclosed "only if the party receiving it provides some assurance that it will remain secret."¹⁶⁵ In so holding, the Court declined to resolve whether both were necessary and rejected a line of authority initiated by the D.C. Circuit's decision in *National Parks & Conservation Ass'n v. Morton* that added the further requirement that the disclosure of the information would cause substantial competitive harm.¹⁶⁶

¹⁶² *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

¹⁶³ U.S. Dep't of Justice, *Waiver and Discretionary Disclosure*, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 16 (Aug. 28, 2019), available at <https://www.justice.gov/oip/page/file/1198006/download>.

¹⁶⁴ 5 U.S.C. § 552(b)(4).

¹⁶⁵ 139 S. Ct. 2356, 2363 (2019). The Supreme Court cited with approval a Ninth Circuit decision concluding that Exemption 4 "would protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise of confidentiality. *Id.* (quoting *Gen. Servs. Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969) (internal quotation marks omitted)).

¹⁶⁶ *Id.* at 2363–65 (overturning *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974)).

Sufficient assurances of confidentiality can be implied or express.¹⁶⁷ However, such assurance can be implied only if expectations of privacy are reasonable.¹⁶⁸

District Courts have further clarified this ruling, establishing that only information “originating from the companies themselves” can be information that is customarily and actually keep private.¹⁶⁹ Courts also consider the steps that business owners took to keep information private.¹⁷⁰ With respect to the government, Exemption 4 is intended to allow the government to honor any good faith promises it has made not to disclose certain documents.¹⁷¹ The failure to invoke available mechanisms for protecting CBI constitutes a waiver of rights to confidential treatment under Exemption 4.¹⁷²

Because the *Food Marketing Institute* decision is new, the doctrine will likely develop as courts begin to interpret it. In any event, even if certain information in a document is exempt, non-exempt portions of a document “must be disclosed unless they are inextricably intertwined with exempt portions.”¹⁷³

Most information falling under Exemption 4 is not appropriate for discretionary disclosure by an agency. If an agency chose to disclose information falling under Exemption 4, businesses could bring a reverse FOIA¹⁷⁴ suit under the APA alleging that the agency’s actions

¹⁶⁷ *Id.* at 2363.

¹⁶⁸ U.S. Dep’t of Justice v. Londano, 508 U.S. 165, 179 (1993) (holding that “an implied assurance of confidentiality” may be reasonably inferred under FOIA Exemption 7(D) based on certain “generic circumstances”), cited with approval by *Food Mktg. Inst.*, 139 S. Ct. at 2363–64

¹⁶⁹ Am. Small Bus. League v. U.S. Dep’t of Def., 411 F. Supp. 3d 824, 830 (N.D. Cal. 2019).

¹⁷⁰ See *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 790 Fed. Appx. 134, 136 (9th Cir. 2020) (remanding due to a lack of evidence regarding “what specific steps each producer took to keep its information confidential”).

¹⁷¹ See *supra* note 99 and accompanying text.

¹⁷² *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 533 n.11 (D.C. Cir. 1979).

¹⁷³ *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

¹⁷⁴ A reverse FOIA suit is one where “submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request.” *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987).

were “arbitrary and capricious” or “not in accordance with law” under the Trade Secrets Act. Thus, “in the absence of a statute or properly promulgated regulation giving an agency authority to release the information -- which would remove the Trade Secrets Act’s disclosure prohibition—a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because the Trade Secrets Act ‘prohibits’ disclosure.”¹⁷⁵ In other words, if a company properly submits something confidentially and retains its privilege, agencies cannot then decide in their discretion to disclose it unless there was an approving statute.

b. Exemption 6

As noted above, Exemption 6 allows agencies to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁷⁶ The Supreme Court has held that the catchall reference to “similar files” includes “[g]overnment records on an individual which can be identified as applying to that individual,” including email addresses.¹⁷⁷ The Court has also made clear that the term should be read expansively rather than narrowly.¹⁷⁸

If the information is contained within a “similar file,” the statute requires courts to determine “whether the disclosure of [that information]” would amount to “a clearly unwarranted invasion of personal privacy.”¹⁷⁹ Courts making this determination must balance the public interest in disclosure against the privacy interest of the individual,¹⁸⁰ bearing in mind that “under

¹⁷⁵ *Id.* at 1151-52.

¹⁷⁶ 5 U.S.C. § 552(b)(6).

¹⁷⁷ U.S. Dep’t of State v. Wash. Post Co., 456 U.S. 595, 602 (1982).

¹⁷⁸ *Id.* at 600.

¹⁷⁹ 5 U.S.C. § 552(b)(6).

¹⁸⁰ *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999).

Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.”¹⁸¹

The public’s interest in disclosure turns on whether disclosure would “contribute significantly to public understanding of the operations or activities of the government.”¹⁸²

Courts applying this standard have ruled that the interest in disclosure is particularly strong in the context of rulemaking. For example, in ordering the disclosure of email addresses from which bulk comments were submitted in a rulemaking hearing, one court held that “disclosing the identities of those seeking to influence an agency’s actions can shed light on those actions.”¹⁸³

Another court mandating the disclosure of commenters’ names and addresses similarly held that “the public has much to learn about [the agency’s] rulemaking process from the disclosure of commenters’ names and addresses,” including whether “multiple comments [have been] submitted by a single contributor” and whether the agency gave greater weight to residents living near the affected region.¹⁸⁴ Thus, “[a]n agency decision formulating a final rule, which relies in part on written comments submitted by members of the public, clearly warrants full disclosure of those comments.”¹⁸⁵ Courts have been less willing to disclose names and addresses when there is no indication of “any apparent significance attached to individual commenters’ geographical locations.”¹⁸⁶

Conversely, commenters’ privacy interest in their names and addresses are particularly weak for voluntarily submissions when the portal for submission gave commenters notice that

¹⁸¹ Wash. Post Co. v. U.S. Dep’t of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1982).

¹⁸² U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

¹⁸³ Prechtel v. FCC, 330 F. Supp. 3d 320, 330 (D.D.C. 2018).

¹⁸⁴ All. for Wild Rockies v. Dep’t of Interior, 53 F. Supp. 2d 32, 37 (D.D.C. 1999).

¹⁸⁵ *Id.*

¹⁸⁶ *Prechtel*, 330 F. Supp. 3d at 331 (quoting *People for Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 307 n.8 (D.D.C. 2007)).

the submission would be made available to the public¹⁸⁷ and the commenter did not avail themselves of available measures to protect their privacy.¹⁸⁸ After all, privacy under FOIA can undoubtedly be waived.¹⁸⁹ Note, however, that commenters (or agents) cannot waive the privacy on behalf of third parties.¹⁹⁰

Courts also consider the consequences and possible injuries for potentially identified individuals whose information is disclosed. The “scope of the privacy interest” is far greater when the consequences include, for example, “identity theft and other forms of fraud” as opposed to mere embarrassment.¹⁹¹ The possibility of mistreatment, harassment, or retaliation that could occur from disclosure of identities is also considered.¹⁹² Even increased exposure to solicitors trying to sell something has been considered an unwarranted invasion of privacy.¹⁹³

Identifying information must be weighed “not only from the viewpoint of the public, but also from the vantage of those who would have been familiar[] with other aspects of” the individual’s life.¹⁹⁴ Even if someone could not identify an individual merely by the documents being disclosed, courts must also consider whether someone who knew a few more details about

¹⁸⁷ *Id.* at 329 (“The bulk submitters’ privacy interest in their email addresses is minimal in this context. Importantly, bulk submitters had ample indication that their email addresses could be made public, mitigating any expectation of privacy.”); *id.* at 330 (“[W]hen someone submits multiple comments to influence public policy and is told that her email address will become part of the public record, her privacy interest in that email address is not as strong as the Commission now suggests.”).

¹⁸⁸ *All. for Wild Rockies*, 53 F. Supp. 2d at 37 (“[The agency] made it abundantly clear in its notice that the individuals submitting comments to its rulemaking would not have their identities concealed. Had defendants intended otherwise, they could have taken efforts at the time the notice was published to assure commenters that their responses would be confidential or to offer them the opportunity to request anonymity.”).

¹⁸⁹ *Comput. Prof’ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996).

¹⁹⁰ *Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 359 (5th Cir. 2001) (“[W]e . . . reject Sherman’s argument that the Army has the power to waive the privacy interest of service personnel in limiting the disclosure of their social security numbers . . .”).

¹⁹¹ *Id.* at 365.

¹⁹² *See U.S. Dep’t of State v. Ray*, 502 U.S. 164, 176 (1991) (“[T]he privacy interest in protecting [Haitian nationals who had been denied asylum and returned to Haiti] from any retaliatory action that might result from a renewed interest in their aborted attempts to emigrate must be given great weight.”).

¹⁹³ *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989).

¹⁹⁴ *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380 (1976).

the individual's life could put two and two together.¹⁹⁵ Thus, the concern over unwarranted disclosure of private information is not with the identifying information on its face, but rather with the practical impact of the disclosure, including “the connection between such information and some other detail—a statement, an event, or otherwise—which the individual would not wish to be publicly disclosed.”¹⁹⁶ After all, no one can guarantee that those “in the know will hold their tongues.”¹⁹⁷ The Court also notes that in an organized society, privacy rights instead depend on the degree of dissemination and the extent to which time has rendered previously disclosed information private.¹⁹⁸

Applying these criteria, courts have considered records that contain information such as “place of birth, date of birth, date of marriage, employment history, and comparable data” as ‘similar files’ for the first step of the Exemption 6 analysis.¹⁹⁹ Similarly, Social Security numbers have been held as exempt under FOIA.²⁰⁰

Applying the FOIA Exemption 6 balancing test, personal financial information such as bank numbers or Social Security numbers are most likely to be exempted from disclosure even when included in public comments. A Social Security number or account number would not help inform a citizen of an agency's actions and would open up the commenter to extreme identity theft risk. In situations where such information would help citizens understand an agency's actions, however, names, addresses, and other important information included in the comment (like personal medical information) will likely not be exempt. Because these are comments the

¹⁹⁵ *Id.*

¹⁹⁶ *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989).

¹⁹⁷ *Id.* (internal quotation marks omitted).

¹⁹⁸ *Reporters Comm.*, 489 U.S. at 763.

¹⁹⁹ *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982).

²⁰⁰ *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 359 (5th Cir. 2001).

agency considered, the contents will certainly contribute to public understanding of an agency's through process or activities. Note that since someone cannot waive a third party's privacy interests, the privacy interest for information submitted by a third party is likely higher than that for information someone submitted about themselves.

Typically, "if Privacy-Act information falls within a FOIA exemption, a discretionary release of such information is not appropriate."²⁰¹ As explored above, the information involved is covered by the Privacy Act, agencies cannot use their discretion to disclose it, as it would be barred by statute. However, in the instances where the Privacy Act does not apply and there has been a waiver, discretionary disclosure may be appropriate. Similarly, reverse FOIA suits regarding Exemption 6 have not always been successful, indicating that discretionary disclosure of material covered by FOIA Exemption 6 is sometimes appropriate.²⁰²

c. Analysis

These decisions have considerable implications for agencies' obligations to disclose or withhold comments submitted in public rulemaking dockets. Regarding CBI, *Food Marketing Institute* makes it clear that any information that commenters submit without following the steps needed for confidential submission will fall outside Exemption 4 and be subject to public disclosure under FOIA.

Regarding personal information, the inquiry into whether a disclosure would constitute an unwarranted invasion of privacy requires balancing the public interest in disclosure against the

²⁰¹ U.S. Dep't of Justice, *supra* note 161, at 16.

²⁰² See *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (denying petitioner's request to force agency to withhold information under Exemption 6 because FOIA exemptions are discretionary). *But see* *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1182 (8th Cir. 2000) (enjoining an agency to withhold information under Exemption 6).

private interest in withholding. In the context of notice-and-comment rulemaking, the public interest in disclosing is strong, and the fact that commenters received notice that their comments will be made public unless they exercise the confidential submission process makes the privacy interest somewhat attenuated. Even in the case of inadvertent submission, the fact that submitters receive warnings about confidentiality lowers their privacy interests.

Thus, while certain contact information may fall outside of Exemption 6 and be subject to disclosure as long as proper disclaimers are given, Social Security Numbers and bank account numbers which provide little benefit to helping the public evaluate government actions should be withheld.

D. Synthesizing the Duties and Interpretive Decisions

The body of judicial decisions interpreting the statutes discussed above provides useful guidance for how agencies should give effect to the policy in favor of open government while simultaneously fulfilling agencies' duty to protect certain types of information. Although these statutes contain frameworks for analyzing the relevant tradeoffs that are theoretically distinct, the terms of the Privacy Act, the Trade Secrets Act, and the Sunshine Act look to FOIA to provide the relevant principles.

FOIA thus represents a key lodestar for determining the proper way to balance agencies' duties to disclose and their duties to withhold. It reflects a strong, default commitment to full disclosure. Absent specific congressional direction reflected in one of the specified lists of narrowly construed statutory exemptions, the policies in FOIA counsel strongly in favor of disclosure.

On the other hand, privacy interests are relatively weak for comments submitted voluntarily into a portal containing a warning that all comments would be publicly available and

when the commenter did not avail themselves of available measures to protect their privacy. Privacy interests are stronger for information such as Social Security and bank account numbers, place of birth, date of birth, date of marriage, and employment history, where their disclosure would provide few public benefits and raise significant risks of identity theft. In instances where someone's personal information (for example, location, place of birth, or employment history) would provide public benefits, the privacy interest is mixed. In such situations, agencies could redact the information to reduce the risks of identity theft. For example, exact dates of employment be redacted within the comment, leaving only the years an employee worked there; birth days, but not months, could be redacted.

Agencies can mitigate these risks by making prominent disclosures that comments are generally publicly available and providing clear instructions for commenters who wish to make confidential submissions. Both FOIA and the E-Government Act of 2002 suggest that agencies should consider reviewing comments and redacting Social Security numbers, bank account numbers, birth dates, wedding dates, and comparable data. Addresses may be reduced to city and state in appropriate circumstances where the exact location of the submitter was not relevant to rulemaking. The APA recognizes the discretion for agencies to withhold confidential business data. Any redactions must provide meaningful opportunity for the public to engage with the comments.²⁰³

²⁰³ See *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 237 (D.C. Cir. 2008) (explaining that information “upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment” and cannot be cherry-picked with redactions).

II. AGENCY PRACTICES WITH RESPECT TO DISCLOSING AND WITHHOLDING PROTECTED MATERIALS IN RULEMAKING DOCKETS

The research team supplemented its analysis of the legal materials regarding agency duties to disclose and withhold protected materials with an assessment of real-world agency practices. This research focused on two types of sources. First, it reviewed publicly available materials, including:

- Language in NPRMs issued by agencies;
- System of Record Notices (SORNs) issued by all agencies examined; and
- Agency web portals for accepting comments in rulemaking proceedings.

Second, the research team gathered information directly from agency officials. It did so in three ways:

- A roundtable on January 8, 2020, in which 17 officials from 14 agencies participated;
- In-depth interviews with officials from 6 agencies;²⁰⁴ and
- A survey of agency practices sent to 43 agencies (see Appendix A for the survey text).

The survey generated received 27 responses from 23 agencies²⁰⁵, although not all respondents answered every question. Seventeen of the responses were from people explicitly identified as attorneys (general counsels, special counsels, and attorneys).

²⁰⁴ We interviewed officials from EPA, DHS, SEC, DOE, FCC, and Treasury.

²⁰⁵ The 23 agencies that responded to the survey in some capacity are the Board of Governors of the Federal Reserve System; Centers for Medicare & Medicaid Services, HHS; Federal Trade Commission; Internal Revenue Service; National Labor Relations Board; Pension Benefit Guaranty Corporation; Postal Regulatory Commission; Social Security Administration; Surface Transportation Board; U.S. Commodity Futures Trading Commission; U.S. Consumer Product Safety Commission; U.S. Department of Agriculture; U.S. Department of Defense; U.S. Department of Education; U.S. Department of Housing and Urban Development; U.S. Department of Homeland Security; U.S. Department of Labor (OSHA); U.S. Department of State; U.S. Department of Veterans Affairs; U.S. Department of Transportation; U.S. Equal Employment Opportunity Commission; U.S. Food and Drug Administration; and the U.S. Nuclear Regulatory Commission.

A. Advance Notice of Policies Governing Protected Materials

One set of questions in the survey focused on how agencies provide guidance to commenters and other individuals submitting information. Eighteen respondents representing 17 agencies explained the types of situations in which they give guidance regarding policies on the submission of CBI and PII. Their responses are summarized in Table 1.

Table 1: Ways Agencies Surveyed Provide Advance Disclosures of Policies Regarding CBI and PII

Type	Responses
Notices in NPRMs	17
Notices provided prior to public meetings	6
Guidance provided on websites	4
Notices on surveys	4
Agency regulations	2
Notices provided during negotiated rulemakings	2
Notices regarding ex parte communications	2
Guidance in Systems of Records Notices (SORNs)	1

Seventeen of 27 responses (63%), and all agencies who responded to the question,²⁰⁶ indicated that they rely on language in NPRMs and Advance NPRMs to notify individuals of their policies regarding withholding and disclosure of CBI and PII. Other mechanisms include notices provided prior to public meetings (6 responses/22%), guidance on websites (4 responses/14%), notices on surveys (4 responses/14%), agency regulations (2 responses/7%), notices provided during negotiated rulemakings (2 responses/7%), notices regarding ex parte communications (2 responses/7%), and guidance in Systems of Records Notices (SORNs) (1 response/4%).

²⁰⁶ Note that one additional agency selected “other,” but did not describe any method aside from saying that it “provides notice.”

1. *Notices of Proposed Rulemaking (NPRMs)*

The most common practice for providing advance notice of policies regarding the disclosure and withholding of CBI and PII is to include language describing those policies in NPRMs published in the *Federal Register*. To assess this practice, the research team examined NPRMs issued by all 43 agencies examined to assess the disclosures they made about the handling of CBI and PII submitted in comments. The results are summarized in Table 2, and the results are reported in Appendix B.

Table 2: Terms Agencies Examined Include in NPRMs to Disclose Policies Regarding CBI and PII

Type	Responses
Notice that comments will be disclosed to the public	37
Guidance not to include PII/CBI in comments	10
Guidance not to include PII in comments	8
Guidance not to include CBI in comments	1
Guidance regarding alternative mechanisms for submitting PII or CBI	9
Notice of agency discretion to redact information from comments	1
Guidance on how to challenge decisions regarding disclosure or withholding	5

One striking aspect about which guidance regarding protected materials tends to reflect the likelihood that agency will encounter CBI and PII given its particular mission. Three survey agency responses emphasized that the nature of their work rarely require them to encounter or deal with PII or CBI. One noted that its rules consist of legal interpretations that do not require access to protected materials. Another indicated that its authority is limited to setting rates and that that authority does not require access to protected materials. A third looks exclusively at firm-level data that is generally publicly available.

The same insight is implicit in the practice of disclosing policies with respect to protected materials in NPRMs. The following 9 agencies include language in their NPRMs directing

commenters not to disclose PII without mentioning CBI: Consumer Finance Protection Board (CFPB), National Labor Relations Board (NLRB), Occupational Safety and Health Administration (OSHA), U.S. Department of State (DOS), U.S. Equal Employment Opportunity Commission (EEOC), U.S. Nuclear Regulatory Commission (NRC), U.S. Office of Government Ethics (OGE), and U.S. Securities and Exchange Commission (SEC). Although there are some conspicuous absences,²⁰⁷ many of these appear to be agencies whose work is more likely to encounter personal information. Conversely, the only agency to include language in its NPRM directing commenters not to disclose CBI without mentioning PII is the U.S. Environmental Protection Agency (EPA), which is likely to receive significant amounts of commercially sensitive information, but is unlikely to encounter PII.

The implication is that policies regarding the disclosure and withholding of protected materials should give agencies flexibility to modify them to reflect each agency's particular area of responsibility. For example, while a blanket notice for all commenters on commenting websites would be sufficient for every agency no matter what they encounter, policies regarding the challenging of disclosure and withholding or the submission of confidential material may change depending on the volume of information an agency receives.

a. Notices of public disclosure of any protected materials contained in comments

The survey of NPRMs reveal that the most common practice among agencies is to notify commenters that all submissions will be made available to the public. As indicated in Table 2, 37 of the 43 agencies examined (86%) include such disclosures in their NPRMs.

²⁰⁷ One might have expected to find the Centers for Medicare and Medicaid Services (CMS), DVA, and OPM on this list. These three agencies do not provide any guidance about nondisclosure regardless of whether it is PII.

Many agencies disclose that all comments will be made public without making specific reference to PII or CBI. For example, an NPRM issued by the Internal Revenue Service (IRS) simply states, “All comments will be available at <http://www.regulations.gov> or upon request.”²⁰⁸ The U.S. Department of Veterans Affairs (DVA) adopts a similar practice, including language in a recent NPRM stating, “Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday (except holidays).”²⁰⁹ An NPRM adopted by the Federal Energy Regulatory Commission (FERC) also provides, “All comments will be placed in the Commission’s public files and maybe viewed, printed, or downloaded remotely as described in the Document Availability section below.”²¹⁰

Some agencies caution commenters to exercise caution in determining what to submit without mentioning any particular type of information. For example, a recent NPRM issued by the Commodities Futures Trading Commission (CFTC) states, “Comments will be posted as received to <http://www.cftc.gov>. *You should submit only information that you wish to make available publicly.*”²¹¹ The U.S. Department of Education’s (ED’s) NPRMs provide a slightly longer disclosure along the same lines:

Privacy Note: The Department’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be

²⁰⁸ Revised Applicability Dates for Regulations Under Section 382(h) Related to Built-in Gain and Loss, 85 Fed. Reg. 2,061, 2,063 (Jan. 14, 2020).

²⁰⁹ Veterans Community Care Program-Organ and Bone Marrow Transplant Care, 84 Fed. Reg. 13,576, 13,577 (Apr. 5, 2019).

²¹⁰ Electric Reliability Organization Proposal to Retire Requirements in Reliability Standards Under the NERC Standards Efficiency Review, 85 Fed. Reg. 6,831, 6,838 ¶ 55 (Feb. 6, 2020).

²¹¹ Certain Swap Data Repository and Data Reporting Requirements, 84 Fed. Reg. 21,044, 21,044 (May 13, 2019) (emphasis added).

careful to include in their comments only information that they wish to make publicly available.²¹²

Some notices specify that certain types of information contained in comments will be made available to the public. NPRMs issued by the U.S. Department of Defense (DOD) and the U.S. Office of Personnel Management (OPM) warn that public disclosure of comments will include any “personal identifiers or contact information” contained therein.²¹³ An NPRM issued by the U.S. International Trade Commission (USITC) broadens this notice to caution commenters that “any personal information provided will be viewable by the public.”²¹⁴ A recent NPRM issued by the U.S. Department of Transportation’s (DOT) Federal Aviation Administration similarly stated: “We will post all comments we receive, without change, to <http://www.regulations.gov>, *including any personal information you provide.*”²¹⁵

The Center for Medicare & Medicaid Services (CMS) is the only agency to refer to both CBI and PII in its guidance regarding the public disclosure of comments submitted: “Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, *including any personally identifiable or confidential business information* that is included in a comment.”²¹⁶

²¹² Federal Perkins Loan Program, Federal Work-Study Programs, Federal Supplemental Educational Opportunity Grant Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, Teacher Education Assistance for College and Higher Education Grant Program, Federal Pell Grant Program, Leveraging Educational Assistance Partnership Program, and Gaining Early Awareness and Readiness for Undergraduate Programs, 84 Fed. Reg. 67,778, 67,778 (Dec. 11, 2019).

²¹³ Department of Defense Privacy Program, 83 Fed. Reg. 46,542, 46,542 (Sept. 13, 2018); Prevailing Rate Systems; Definition of Pitt County, North Carolina, to a Nonappropriated Fund Federal Wage System Wage Area, 84 Fed. Reg. 72,250, 72,250 (Dec. 31, 2019).

²¹⁴ Rules of General Application, 82 Fed. Reg. 44,982, 44,983 (Sept. 27, 2017).

²¹⁵ Airworthiness Directives; Airbus SAS Airplanes, 84 Fed. Reg. 30,637, 30,637 (June 27, 2019) (emphasis added).

²¹⁶ Basic Health Program; Federal Funding Methodology for Program Year 2021, 85 Fed. Reg. 27, 7501 (Feb. 10, 2020) (emphasis added).

b. Guidance not to submit protected materials in comments

Some agencies went beyond a warning about the potential public disclosure of protected materials contained in comments by providing guidance not to include such protected materials in rulemaking submissions. As indicated in Table 2, 10 of the 43 agencies examined (23%) included language in their NPRMs cautioning submitters against including PII or CBI in their comments. An additional 8 agencies (19%) made a similar warning limited to PII, with 1 other agency (2%) offering a similar warning limited to CBI.

Some agencies refer to protected materials generally without referring specifically to PII or CBI. For example, an NPRM issued by the Office of the Comptroller of the Currency (OCC) made a general warning “not to include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.”²¹⁷

Other agencies referred directly to CBI. A recent NPRM issued by the EPA contained the following language: “Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.”²¹⁸ Other agencies’ NPRMs gave specific examples of CBI:

- DOC: “business information, or otherwise proprietary, sensitive or protected information.”²¹⁹
- U.S. Department of Energy (DOE): “trade secrets and commercial or financial information.”²²⁰
- OMB: “confidential business information, trade secret information, or other sensitive or protected information.”²²¹

²¹⁷ Employment Contracts, Mutual to Stock Conversions, 85 Fed. Reg. 1,052, 1,052 (Jan. 8, 2020).

²¹⁸ Air Plan Approval; FL; 2010 1-Hour SO₂ NAAQS Transport Infrastructure, 85 Fed. Reg. 7,480, 7,480 (Feb 10, 2020).

²¹⁹ Guidance on Federal Conformity Assessment Activities, 85 Fed. Reg. 7,258, 7,258 (Feb. 7, 2020).

²²⁰ Energy Conservation Program: Energy Conservation Standards for Consumer Refrigerators, Refrigerator-Freezers, and Freezers, 84 Fed. Reg. 62,470, 62,481 (Nov. 15, 2019).

²²¹ OMB Freedom of Information Act Regulation, 83 Fed. Reg. 42,610, 42,610 (Aug. 23, 2018).

- Federal Election Commission (FEC): “trade secrets or commercial or financial information.”²²²

The language in a recent Federal Trade Commission (FTC) NPRM was even more specific:

In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential”—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)— including in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.²²³

DOE disclosure explicitly provided that “[c]omments submitted through <http://www.regulations.gov> cannot be claimed as CBI” and that “[c]omments received through the website will waive any CBI claims for the information submitted.”²²⁴ One interview participant concurred that commenters that post PII despite these warnings have essentially waived any claims to confidentiality or protection.

Regarding PII, many agencies’ NPRMs advise commenters not to include any PII in their comments. For example, the DOS, NRC, and SEC limit this warning to “identifying or contact information” or “personal identifying information.”²²⁵ Other agencies augment this warning with lists of particular types of PII:

- CFPB: “account numbers or Social Security numbers, or names of other individuals.”²²⁶
- DOC: “account numbers or Social Security numbers, or names of other individuals.”²²⁷

²²² Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,684, 12,684 (Mar. 26, 2018).

²²³ Military Credit Monitoring, 83 Fed. Reg. at 57,699.

²²⁴ Energy Conservation Program, 84 Fed. Reg. at 62,482.

²²⁵ List of Approved Spent Fuel Storage Casks, 85 Fed. Reg. 1,129, 1,129 (Jan. 9, 2020); Modernization of Regulations S-K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,358 (Aug. 23, 2019); International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198, 24,198 (May 24, 2018).

²²⁶ Remittance Transfers Under the Electronic Fund Transfer Act, 84 Fed. Reg. 67,132, 67,132 (Dec. 6, 2019).

²²⁷ Guidance on Federal Conformity Assessment Activities, 85 Fed. Reg. at 7,258.

- FEC: “home street address, personal email address, date of birth, phone number, social security number, or driver’s license number.”²²⁸
- NLRB: “Social Security numbers, personal addresses, telephone numbers, and email addresses.”²²⁹
- OSHA: “Social Security Numbers, birthdates, and medical data.”²³⁰
- OGE: “account numbers or Social Security numbers.”²³¹
- U.S. Social Security Administration (SSA): “Social Security numbers or medical information.”²³²

Again, the NPRMs issued by the FTC provide the most complete guidance in this regard:

Because your comment will be placed on the publicly accessible FTC website at <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information.²³³

c. Guidance regarding alternative mechanisms for submitting comments containing protected materials

Agency practice regarding notice of alternative methods for submitting protected materials varies. As indicated in Table 2, only 9 of 43 agencies examined (21%) provide such guidance in their NPRMs.

²²⁸ Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,684, 12,684 (March 26, 2018).

²²⁹ Jurisdiction—Nonemployee Status of University and College Students Working in Connection with Their Studies, 84 Fed. Reg. 49,691, 49,691 (Sept. 23, 2019).

²³⁰ Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 84 Fed. Reg. 53,902, 53,902 (Oct. 8, 2019).

²³¹ Post-Employment Conflict of Interest Restrictions; Departmental Component Designations, 85 Fed. Reg. 7,252, 7,252 (Feb. 7, 2020).

²³² Advance Designation of Representative Payees for Social Security Beneficiaries, 84 Fed. Reg. 65,040, 65,040 (Nov. 26, 2019).

²³³ Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. 58,348, 58,349 (Oct. 31, 2019).

Some agencies provide quite general guidance. NPRMs released by the DOS and the U.S. Merit Systems Protection Board (MSPB) notify prospective commenters that they may submit their comments anonymously.²³⁴ For example, a recent NPRM issued by the U.S. Small Business Administration (SBA) requests submitters to highlight any CBI and explain why they believe the agency should withhold that information as confidential, subject to agency review.²³⁵ The FTC’s NPRMs follow a similar approach:

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.²³⁶

NPRMs issued by the U.S. Department of Agriculture (USDA) and the U.S. Department of Justice (DOJ) provide somewhat more specific guidance that requires the inclusion of the phrase “PERSONAL IDENTIFYING INFORMATION” or “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of the comment and prominently identify the information to be redacted from the comment.²³⁷ These NPRMs indicate that information properly marked as PII or CBI will not be posted online without mentioning any discretionary

²³⁴ International Traffic in Arms Regulations, 79 Fed. Reg. at 24,198; Practices and Procedures, 79 Fed. Reg. 18,658, 18,658 (Apr. 3, 2014).

²³⁵ Small Business Size Standards: Calculation of Annual Average Receipts, 84 Fed. Reg. 29,399 (June 24, 2019).

²³⁶ Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. at 58,349.

²³⁷ Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2,897, 2,898 (Jan. 17, 2020); Schedules of Controlled Substances: Placement of Cyclopentyl Fentanyl, Isobutyryl Fentanyl, Para-Chloroisobutyryl Fentanyl, Para-Methoxybutyryl Fentanyl, and Valeryl fentanyl Into Schedule I, 85 Fed. Reg. 5,356, 5,356 (Jan. 30, 2020).

authority to review whether the redacted material actually constitutes protected information.²³⁸

Both agencies note that comments containing so much protected material that they cannot be effectively redacted may be partially or completely withheld from the public.²³⁹

DOE and the Food Drug Administration require commenters seeking confidential treatment to submit both redacted and unredacted versions of comments.²⁴⁰ Like the FTC, both of these agencies require that requests for confidential treatment be submitted in written form.²⁴¹ DOE makes clear that it “will make its own determination about the confidential status of the information and treat it according to its determination.”²⁴²

Other agencies include language in the NPRM directing commenters to other resources where information is available. For example, a recent EPA NPRM directs commenters towards its own website,²⁴³ which contains guidance requiring the submission of redacted and unredacted versions of comments containing CBI, including instructions not to submit CBI electronically.²⁴⁴

d. Notices of agency discretion to redact information from comments

As indicated in Table 2, only one agency (2%) provides explicit advance notice of its discretionary authority to redact comments. Specifically, a recent NPRM issued by the Commodity Futures Trading Commission (CFTC) states:

²³⁸ Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs, 85 Fed. Reg. at 2,898; Schedules of Controlled Substances, 85 Fed. Reg. at 5,356.

²³⁹ Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs, 85 Fed. Reg. at 2,898; Schedules of Controlled Substances, 85 Fed. Reg. at 5,356.

²⁴⁰ Energy Conservation Program, 84 Fed. Reg. at 62,482; Content and Format of Substantial Equivalence Reports; Food and Drug Administration Actions on Substantial Equivalence Reports, 84 Fed. Reg. 12,740 (Apr. 2, 2019).

²⁴¹ Energy Conservation Program, 84 Fed. Reg. at 62,482; Content and Format of Substantial Equivalence Reports, 84 Fed. Reg. at 12,740.

²⁴² Energy Conservation Program, 84 Fed. Reg. at 62,482.

²⁴³ Air Plan Approval; FL; 2010 1-Hour SO₂ NAAQS Transport Infrastructure, 85 Fed. Reg. at 7,491.

²⁴⁴ *Commenting on EPA Dockets*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/dockets/commenting-epa-dockets> (last visited Feb. 13, 2020).

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.²⁴⁵

Note that this right of redaction emphasizes the problem of obscene language instead of protected information.

e. Notices of opportunities to challenge decisions regarding disclosure or withholding

As indicated in Table 2, 5 of the 43 agencies examined (12%) include language in their NPRMs providing guidance to commenters of how to challenge agency decisions regarding disclosure or withholding of protected material. The best developed example is the CFTC NPRM, which included language in a recent NPRM directing those wishing to submit protected information to do so in accordance with 17 C.F.R. § 145.9.²⁴⁶ Along with instructions about how make such a submission, the cited regulation also lays out how such requests will be processed by the agency, beginning with an initial determination and the opportunity to appeal that initial determination to the General Counsel.²⁴⁷

2. Public Meetings

Many agencies also encounter protected materials in public meetings. As noted above, 6 of the 27 responses to the survey (22%) reported that they provide notice regarding the

²⁴⁵ Certain Swap Data Repository and Data Reporting Requirements, 84 Fed. Reg. at 21,044.

²⁴⁶ *Id.*

²⁴⁷ 17 C.F.R. § 145.9(d)–(g).

submission of PII or CBI in public meetings, although only 4 described how that guidance is provided. The SEC has also published a SORN regarding comments submitted during Commission hearings.²⁴⁸

One agency states that it “sometimes” provides notice by making a statement at the meeting. Another agency provides notice within the meeting materials. A third agency gives notice that the meeting is going to be broadcasted or recorded. Finally, two of the agencies stated that they rely statements in the *Federal Register* notices that announce upcoming meetings to provide guidance on how information submitted at the meetings will be used. As one agency pointed out in an interview, most people at the meetings are aware the meetings are public and know not to share personal or sensitive information they want to keep private.

3. *Websites*

Notices and disclaimers provided in websites through which interested parties submit comments represent another important source of advance notice of policies governing the disclosure and withholding of CBI and PII in comments submitted in the public rulemaking dockets. Regulations.gov lists 29 of the 43 agencies examined (67%) as participating agencies.²⁴⁹ Of these 43 agencies, 14 do not participate in Regulations.gov.²⁵⁰ Of these 14, 4 agencies require

²⁴⁸ Securities and Exchange Commission; Privacy Act of 1974, 41 Fed. Reg. 41,550, 41,562–63 (Sept. 22, 1976) (SEC-15).

²⁴⁹ The 29 agencies examined who participate in Regulations.gov are the CMS, CFPB, FTC, IRS, National Archives and Records Administration, NLRB, OSHA, OMB, OCC, SSA, USDA, DOC, DOD, ED, DOE, DHS, DOJ, DOL, DOS, Treasury, DOT, DVA, EPA, EEOC, FDA, GSA, NRC, OPM, and SBA. *Participating Agencies*, REGULATIONS.GOV (Nov. 2019), https://www.regulations.gov/docs/Participating_Agencies.pdf.

²⁵⁰ *Non-Participating Agencies*, REGULATIONS.GOV (Nov. 2019), https://www.regulations.gov/docs/Non_Participating_Agencies.pdf.

paper submissions,²⁵¹ and the other 10 agencies solicit and accept comments through their own websites, which are analyzed below.

a. Regulations.gov

As noted above, two thirds of agencies examined accept comments in rulemaking proceedings through the Regulations.gov website.²⁵² The USITC accepts submissions both through Regulations.gov and its own website.²⁵³ A screenshot of the comment submission page for Regulations.gov appears in Figure 1. The process for submitting comments necessarily exposes prospective submitters to a number of notices and disclaimers.

²⁵¹ Simplified Proceedings, 75 Fed. Reg. 28,223, 28,223 (June 21, 2010) (Federal Mine Safety and Health Review Commission); Practices and Procedures, 80 Fed. Reg. 66,787, 66,787 (Oct. 30, 2015) (MSPB); Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission, 83 Fed. Reg. 48, 578, 48,578 (Sept. 26, 2018) (Occupational Safety and Health Review Commission); Post-Employment Conflict of Interest Restrictions; Departmental Component Designations, 85 Fed. Reg. 7,252, 7,252 (Feb. 7, 2020) (OGE).

²⁵² See *supra* note 249 and accompanying text.

²⁵³ Submission and Consideration of Petitions for Duty Suspensions and Reductions, 84 Fed. Reg. 9,273, 9,273 (Mar. 14, 2019).

Figure 1: Comment Submission Page for Regulations.gov

regulations.gov
Your Voice in Federal Decision-Making

Home Help Resources Contact Us
Advanced Search

You are commenting on:
The Federal Trade Commission (FTC) Notice: Agency Information Collection Activities; Submission for OMB Review; Comment Request
For related information, [Open Docket Folder](#)

1 Your Information 2 Your Preview 3 Your Receipt

Information entered will be viewable on Regulations.gov [View Commenter's Checklist \(PDF\)](#)
[Alternate Ways to Comment](#)

Comment (Required)

5000 characters remaining

Upload file(s) (Optional) Drop files here
Choose files

First Name Last Name

I want to provide my contact information
 I am submitting on behalf of a third party

Continue

Please see the [Privacy Notice](#) and [User Notice](#) regarding comment submission.

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the [Privacy Notice](#) and [User Notice](#), the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.

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Notice at the Bottom on the “Comment Now!” Webpage

Members of the public may submit comments by using the available finding tools to identify the relevant matter. Next to the entry of the relevant rule will appear either a button stating, “Comment Now!,” or a notice stating, “Comment instructions in document.” Those

accessing the “Comment Now!” function will be taken to a comment page with the following disclaimer at the bottom:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy Notice and User Notice, the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.²⁵⁴

[Link to the “Privacy Notice” at the Bottom of the “Comment Now!” Webpage.](#)

Clicking on the “Privacy Notice” presents prospective commenters with additional notice on “Sharing and Disclosure,” including the following text:

The material you submit to a federal department or agency through Regulations.gov may be seen by various people. Any personally identifiable information (e.g., name, address, phone number) included in the comment form or in an attachment will be provided to the department or agency to which your comment is directed and may be publicly disclosed in a docket or on the Internet (via Regulations.gov, a federal agency website, or a third-party, non-government website with access to publicly-disclosed data on Regulations.gov).²⁵⁵

[Link to the “User Notice” at the Bottom of the “Comment Now!” Webpage](#)

The User Notice contains the following notice on “Comments and Public Submissions”:

. . . You should be aware that requirements for submitting comments may vary by department or agency. For purposes of submitting comments, some agencies may require that you include personal information, such as your name and email address, on the comment form. Each agency manages its own data within the site, according to agency-specific comment review and posting policy. Comments may be publicly disclosed in a docket or on the Internet (via Regulations.gov, a federal agency website, or a third-party, non-government website with access to publicly-disclosed data on Regulations.gov).

²⁵⁴ *Comment Now!*, REGULATIONS.GOV, https://www.regulations.gov/comment?D=DOS_FRDOC_0001-5130 (last visited Feb 16, 2020).

²⁵⁵ *Privacy Notice*, REGULATIONS.GOV, <https://www.regulations.gov/privacyNotice> (last visited Feb 16, 2020).

Do not submit information whose disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information “CBI”) to Regulations.gov. Comments submitted through Regulations.gov cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. Some agencies may impose special requirements for submitting CBI or copyrighted works. To view any additional information or instructions for submissions, refer to the specific Federal Register notice on which you are commenting and the website of the department or agency.²⁵⁶

[Link to “Alternate Ways to Comment” at the Top of the “Comment Now!” Webpage](#)

Regulations.gov itself does not provide uniform instructions regarding opportunities for confidential submission. However, a button for “Alternate Ways to Comment” sometimes appears in the upper right region of each comment submission page that agencies are able use to provide additional instructions regarding how to submit protected information. Examples of some of the more complete disclosures appear below.

Some agencies use this function to provide guidance regarding alternative methods for submitting comments containing CBI. For example, the EPA uses a variety of language in its postings, but its most complete one instructs commenters not to submit CBI or other information whose disclosure is restricted by statute; informs them that EPA’s policy is to include all comments not claimed to be CBI in the public docket without change, including any personal information provided, and to make them available via Regulations.gov; and directs parties interested in submitting CBI confidentially to consult with the agency via its website, email, or mail.²⁵⁷

²⁵⁶ *User Notice*, REGULATIONS.GOV, <https://www.regulations.gov/userNotice> (last visited Feb 16, 2020).

²⁵⁷ *You are commenting on: The Environmental Protection Agency (EPA) Proposed Rule: National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of Operable Unit 1 of the Libby Asbestos Superfund Site*, REGULATIONS.GOV, <https://www.regulations.gov/comment?D=EPA-HQ-SFUND-2002-0008-0022> (last visited Feb. 14, 2020) (follow “Alternative Ways to Comment” hyperlink).

The language that the DOT discloses under “Alternative Ways to Comment” reflects a somewhat different approach that covers both CBI and PII. For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA), which is a component agency of the DOT, includes a “Privacy Act Statement” disclosing that “DOT posts [rulemaking] comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDAS).”²⁵⁸ It also provide guidance on “Confidential Business Information” instructing filers to “clearly designate the submitted comments as CBI” as appropriate and to submit redacted and unredacted copies along with an explanation why the material is CBI.²⁵⁹ It also informs filers that “[u]nless you are notified otherwise, PHMSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this document.”²⁶⁰ It further specifies that “[a]ny commentary PHMSA receives that is not specifically designated as CBI will be placed in the public docket for this matter.”²⁶¹

The Food and Drug Administration (FDA) provides the most complete disclosure. The agency provides a warning regarding both CBI and PII, including specific examples:

Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact

²⁵⁸ *You are commenting on: The Pipeline and Hazardous Materials Safety Administration (PHMSA) Proposed Rule: Pipeline Safety: Valve Installation and Minimum Rupture Detection Standards*, REGULATIONS.GOV, <https://www.regulations.gov/comment?D=PHMSA-2013-0255-0005> (last visited Feb. 14, 2020) (follow “Alternative Ways to Comment” hyperlink).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.²⁶²

The agency also provides guidance on how to submit a comment containing protected materials that calls for a written/paper submission of redacted and unredacted copies, with the former containing a heading or cover note stating, “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.”²⁶³

The FDA’s notice further directs filers to other relevant guidance: “Any information marked as ‘confidential’ will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.”²⁶⁴

The additional guidance is instructive. The regulation requires the deletion of “the names and other information that would identify patients or research subjects” before submission to the FDA “in order to preclude a clearly unwarranted invasion of personal privacy.”²⁶⁵ In addition, the regulations provide that “[m]aterial prohibited from public disclosure under 20.63 (clearly unwarranted invasion of personal privacy)” will not be made available to the public.²⁶⁶ Interestingly, the regulations also specify that “[t]he office of the Division of Dockets Management does not make decisions regarding the confidentiality of submitted documents.”²⁶⁷

²⁶² *You are commenting on: The Food and Drug Administration (FDA) Proposed Rule: Importation of Prescription Drugs*, REGULATION.GOV, <https://www.regulations.gov/comment?D=FDA-2019-N-5711-0001> (last visited Feb. 14, 2020) (follow “Alternative Ways to Comment” hyperlink).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 21 C.F.R. § 10.20(c)(4).

²⁶⁶ *Id.* § 10.20(j)(2)(i).

²⁶⁷ *Id.* § 10.20(c)(6).

The *Federal Register* reference mentioned in the language revealed by the link to “Alternative Ways to Comment” explains a change in policy by the FDA permitting the public release of consumer comments.²⁶⁸ The “Background” section explained that the volume of comments submitted since the 2007 merger of its docket system with Regulations.gov had undermined the feasibility of its previous policy, announced in 1995, of routinely reviewed all comments for obvious confidential information in order to prevent the disclosure of personal information.²⁶⁹ The shift away from the previous “precautionary” practice of nondisclosure presented no legal problems, “because, as FDA has stated previously, ‘there can be no reasonable expectation of confidentiality for information submitted to a public docket in a rulemaking proceeding.’”²⁷⁰ Such a change was also an improvement over policy of selective disclosure of individual consumer comments.²⁷¹ The change also complies with the 2010 FDA Transparency Initiative,²⁷² aligns with Administrative Conference Recommendation 2013-4’s call for “[a]gencies [to] manage their public rulemaking dockets to achieve maximum public disclosure” consistent with legal limitations and other claims of privilege,²⁷³ and furthers Executive Order No. 13,563’s objective of having agencies “base their regulations on ‘public participation and an open exchange of ideas.’”²⁷⁴

²⁶⁸ Consumer Comments—Public Posting and Availability of Comments Submitted to Food and Drug Administration Dockets, 80 Fed. Reg. 56,469, 56,469 (Sept. 18, 2015).

²⁶⁹ *Id.* at 56,469.

²⁷⁰ *Id.* (quoting Procedures for Handling Confidential Information in Rulemaking, 60 Fed. Reg. 66,981, 66,982 (Dec. 27, 1995)).

²⁷¹ *Id.* at 56,470.

²⁷² *Id.* (citing TRANSPARENCY TASK FORCE, U.S. DEP’T OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., FDA TRANSPARENCY INITIATIVE: DRAFT PROPOSALS FOR PUBLIC COMMENT REGARDING DISCLOSURE POLICIES OF THE U.S. FOOD AND DRUG ADMINISTRATION 4 (May 2010), available at <http://www.lb7.uscourts.gov/documents/02c51292.pdf>).

²⁷³ *Id.* (quoting Administrative Conference Recommendation 2013-4, *supra* note 3, at 8 ¶ 2).

²⁷⁴ *Id.* (quoting Exec. Order No. 13,563, *supra* note 2, § 1).

The following section on “Consumer Comments and Confidential Information” contains specific language about PII, warning commenters that they are “solely responsible for ensuring that the submitted comment does not include any confidential information that the commenter or a third party may not wish to be posted, such as private medical information, the commenter’s or anyone else’s Social Security number, or confidential business information, such as a manufacturing process” and that any name, contact information, or other identifying information included in the body of a submitted comment will be posted on <http://www.regulations.gov>.²⁷⁵ The agency indicates its expectation that comments would need to include private, personal, or confidential information “only in exceptional instances” and directed commenters wishing to submit such information to do so in written/paper form as detailed in the applicable Federal Register document, understanding that the redacted copy will be posted.²⁷⁶

b. Commodities Futures Trading Commission

The CFTC accepts public comment through its own website.²⁷⁷ A screenshot of a typical CFTC’s comment submission page appears in Figure 2.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Public Comments Form*, COMMODITIES FUTURES TRADING COMM’N, <https://comments.cftc.gov/PublicComments/CommentForm.aspx?id=3074> (last visited Feb. 14, 2020).

Figure 2: Comment Submission Page for the Commodities Futures Trading Commission



COMMODITY FUTURES TRADING COMMISSION

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Market Data & Economic Analysis
Forms & Submissions
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The Commission invites comments on proposed rulemakings, proposed orders, and other regulatory actions, or applications for registration or designation, approval requests or self-certifications related to financial products or self-regulatory organization rules or rule amendments, petitions for exemption, and other input collected from the public that may not be associated with statutory or regulatory notice and comment. To be assured consideration by the Commission, comments must be filed prior to the close of any official comment period, if applicable. Comments filed after the close of the official comment period may be considered, at the Commission's discretion.

All comments submitted through this form will become part of the public record and will be published on www.cftc.gov. Your email address is required below to reduce spam, avoid Internet bots, and to send you a link to your published comment. The email address that you provide in the "Commenter Information" field below will not be published on www.cftc.gov.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your comment from www.cftc.gov that it may deem to be inappropriate for publication, such as a comment containing obscene language. Notwithstanding, all comments that are removed from publication on www.cftc.gov will be retained by the Commission for consideration as required under all applicable laws, including the Administrative Procedure Act, and may be accessible under the Freedom of Information Act.

Privacy Act Statement

The information collected on this form is collected pursuant to system of records notice (SORN) CFTC-45. CFTC's collection of this information is authorized under 44 U.S.C. § 3101, 5 U.S.C. § 552, and the Commodity Exchange Act, 7 U.S.C. § 1, et seq., and the rules and regulations promulgated thereunder. The information requested below is being collected to obtain feedback from individuals regarding proposed rulemakings, proposed orders, and other regulatory actions, or applications for registration or designation, approval requests or self-certifications related to financial products or self-regulatory organization rules or rule amendments, petitions for exemption, and other input collected from the public that may not be associated with statutory or regulatory notice and comment. In addition, the information you submit may be used by the agency pursuant to the routine uses in SORN CFTC-45 and the blanket routine uses published by CFTC in the Federal Register at 76 FR 5974 (Feb. 2, 2011). In order to submit a comment, you must complete all required fields. If you fail to complete all required fields below, your comment will not be accepted by the agency.

The Commission will collect, process, disclose and store your personal information in accordance with the CFTC Privacy Policy and as stated on this form. Your submission of comments through this form constitutes your agreement to that Privacy Policy and to the publication of your comment, as explained above.

If you have questions about the Privacy Act, please contact privacy@cftc.gov before submitting your comments or other input.

* Fields that are required. * Fields that will be viewable on CFTC.gov.

Proposed Rule Information

Closing Date: 4/29/2020

Federal Register Release: 85 FR XXXX

Description:
17 CFR Parts 1, 15, 17, 19, 40, 140, 150 and 151 Position Limits for Derivatives

Commenter Information

Prefix:

First Name: *

Middle Initial:

Last Name: *

Organization(s): *

* Required for organizations. Each organization should be placed on a separate line.

E-mail Address: *

Confirm E-mail Address: *

Job Title:

Mailing Address:

Address Line 2:

Country:

City:

State:

ZIP Code:

Telephone Number (daytime):

Comment Information

IMPORTANT REMINDER: All comments entered below will be published on www.cftc.gov without review and without removal of any personally identifying information or information that you or your business may wish to be held confidentially. Do not include social security numbers, your home address, or other personal information in your comment that you prefer not be made publicly available.

Comment: *

Attachments are limited to 10mb in file size and the following document types : .PDF, .txt, .rtf, .doc, and .docx.

Attachment:

Validation Code: * 

Unlike regulations.gov, the CFTC website requires an email address for submission of any online comment to avoid spam and Internet “bots.”²⁷⁸ Though an email address is collected, it is not published on CFTC.gov.²⁷⁹

While the CFTC affirmatively references the possibility of screening, redacting, or even removing comments from their online website if they are “inappropriate for publication,” the language in public comment notice references “obscene language” as opposed to the presence of CBI or PII as possible reasons for take-downs or redactions.²⁸⁰

The CFTC comments webpage includes an “Important Reminder” regarding the public nature of submitted comments:

All comments entered below will be published on www.cftc.gov without review and without removal of any personally identifying information or information that you or your business may wish to be held confidentially. Do not include social security numbers, your home address, or other personal information in your comment that you prefer not be made publicly available.²⁸¹

The website fails to clearly reference any possible method of challenging withholding or disclosure decisions, or any way to submit a confidential comment.

c. Federal Communications Commission

The Federal Communications Commission (FCC) maintains its own Electronic Comment Filing System (ECFS) to receive and maintain all public rulemaking comments and submissions. A screenshot of its comment submission page appears in Figure 3.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

Figure 3: Comment Submission Page for the Federal Communications Commission

For assistance with using ECFS, please contact the ECFS Help Desk at 202-418-0193 or via email at ECFSHelp@fcc.gov.

FC
Federal Communications Commission
Filings & Proceedings SEARCH
Submit a FILING
Check filing STATUS
User HELP

Standard Filing
Express Comment
Non-Docketed Filing

Non-Docketed Filing

1
FILING

2
REVIEW

3
CONFIRMATION

This form is to be used only for submitting the specific types of documents listed in the drop-down menu following "FCC Inbox." Do not use this form to submit comments in a proceeding for which a docket number (e.g., 14-1) or rulemaking number (e.g., RM-10001) has been assigned, comments on existing licensing proceedings, motions in existing formal-complaint proceedings, or anything for which another existing electronic-filing system is available.

Consumers should not use this form to submit informal complaints about service providers. To file an informal complaint, go to <https://consumercomplaints.fcc.gov>. Please note that filing an informal complaint does not require a fee.

If your filing requires payment of a fee, you may use the Commission's Fee Filer system at <https://apps.fcc.gov/FeeFiler>.

NOTE: DO NOT SUBMIT CONFIDENTIAL DOCUMENTS USING ECFS. CONFIDENTIAL DOCUMENTS MUST BE SUBMITTED ON PAPER TO THE OFFICE OF THE SECRETARY. ALL DOCUMENTS SUBMITTED THROUGH ECFS ARE MADE AVAILABLE TO THE PUBLIC.

FCC Inbox

Name(s) of Filer(s) *Required - Add Filer(s). Press ENTER key after each entry

Law Firm(s) * Required - Type the name(s) of the persons or entities whose views are being expressed. Press ENTER after typing each name.
Add Lawfirm(s). Press ENTER key after each entry

Attorney/Author Name(s) Add Law Firm(s) (optional). Press ENTER after typing the name of each Firm.
Add Author(s). Press ENTER key after each entry

Primary Contact Email

Type of Filing

Address of * Required

Address * Required
 International

Address 2

City * Required

State * Required

ZIP * Required

Upload Documents

Click or drop files here: PDF, text, ppt, pptx, docx, xlsx, doc, xls, rtf, dwg
 (overall file(s) max size: 25 MB per submission) (max number of files: 5)

Note: You are filing a document into an official FCC proceeding. All information submitted, including names and addresses, will be publicly available via the web.

Email Confirmation

Continue to review screen →

Reset Form

For assistance with using ECFS, please contact the ECFS Help Desk at 202-418-0193 or via email at ECFSHelp@fcc.gov.

The comment page provides separate tabs for “Standard Filing,” “Express Comment,” and “Non-Docketed Filing.”²⁸² All three options contain the same disclosure language at the bottom of the page: “Note: You are filing a document into an official FCC proceeding. All information submitted, including names and addresses, will be publicly available via the web.”²⁸³ The webpage for non-docketed filing supplements the standard disclosure at the bottom of the page with a much more prominent disclosure at the top of the page, stating:

NOTE: DO NOT SUBMIT CONFIDENTIAL DOCUMENTS USING ECFS. CONFIDENTIAL DOCUMENTS MUST BE SUBMITTED ON PAPER TO THE OFFICE OF THE SECRETARY. ALL DOCUMENTS SUBMITTED THROUGH ECFS ARE MADE AVAILABLE TO THE PUBLIC.²⁸⁴

The FCC’s general guidance on *Rulemaking at the FCC* similarly explains, “If your document contains information you wish withheld from public inspection, you must write ‘**Confidential, Not for Public Inspection**’ on the upper right-hand corner of each page. The documents should then be placed in an envelope also marked ‘**Confidential, Not for Public Inspection.**’”²⁸⁵ Similar language appears on the webpage *Formal Comments in Proceedings*.²⁸⁶ The FCC’s *Guidelines for Filing Paper Documents* and *How to File Paper Documents with the FCC* contain slightly more extensive guidance.

Documents containing information to be withheld from public inspection should be clearly and conspicuously labeled “**CONFIDENTIAL, NOT FOR PUBLIC INSPECTION.**” This designation should be placed in the upper right-hand

²⁸² *Submit a Filing*, FED. COMM’NS COMM’N, <https://www.fcc.gov/ecfs/filings> (last visited Feb. 14, 2020).

²⁸³ *Id.*; *ECFS Express*, FED. COMM’NS COMM’N, <https://www.fcc.gov/ecfs/filings/express> (last visited Feb. 14, 2020).

²⁸⁴ *Non-Docketed Filing*, FED. COMM’NS COMM’N, <https://www.fcc.gov/ecfs/filings/nodocket> (last visited Feb. 14, 2020).

²⁸⁵ *Rulemaking at the FCC*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/rulemaking-fcc> (last visited Feb. 14, 2020).

²⁸⁶ *Formal Comments in Proceedings*, FED. COMM’NS COMM’N, <https://www.fcc.gov/general/formal-comments-proceedings> (last visited Feb. 14, 2020).

corner of each page. If these instructions are not followed, the filer increases the risk for inadvertent disclosure of confidential information.²⁸⁷

The FCC does not explicitly provide information on its website regarding contesting decisions on withholding or disclosure. The bottom of the comment submission page and the instructions instruct anyone needing assistance to contact the ECFS help desk,²⁸⁸ as does the guidance on *Formal Comments in Proceedings*.²⁸⁹

d. Federal Election Commission

The FEC does not currently have any pending rules open for comment.²⁹⁰ As a result, the research team was unable to examine the guidance and disclosures this agency's portal for accepting rulemaking comments. When comments are available, FEC maintains its own website for accepting comments.²⁹¹

e. Federal Energy Regulatory Commission

FERC accepts rulemaking comments through its own website, providing two ways to comment online: eComment²⁹² and eFiling.²⁹³ An eComment, any comment that consists of less than 6,000 words, does not require an eRegistration (which asks for, among other things, name,

²⁸⁷ *Guidelines for Filing Paper Documents*, FED. COMM'NS COMM'N, <https://www.fcc.gov/secretary/guidelines-filing-paper-documents> (last visited Feb. 14, 2020) (emphasis in original); *How to File Paper Documents with the FCC*, FED. COMM'NS COMM'N, <https://www.fcc.gov/reports-research/guides/how-file-paper-documents-fcc> (last visited Feb. 14, 2020) (same).

²⁸⁸ *Submit a Filing*, *supra* note 282.

²⁸⁹ *Formal Comments in Proceedings*, *supra* note 286.

²⁹⁰ *Pending rulemaking matters for comment*, FED. ELECTION COMM'N, <https://www.fec.gov/legal-resources/regulations/pending-rulemaking-matters-comment/> (last visited Feb 15, 2020).

²⁹¹ *Id.*

²⁹² *Quick Comment*, FED. ENERGY REGULATORY COMM'N, <https://ferconline.ferc.gov/QuickComment.aspx> (last visited Feb. 15, 2020).

²⁹³ *eFiling*, FED. ENERGY REGULATORY COMM'N, <https://ferconline.ferc.gov/eFiling.aspx> (last visited Feb. 15, 2020).

phone number, email, address, and the name of the commenter’s affiliate organization).²⁹⁴ A screenshot of its eComment submission page appears in Figure 4.

Figure 4: eComment Submission Page for the Federal Energy Regulatory Commission

FERC Online - Web Applications of the Federal Energy Regulatory Commission

www.ferc.gov

IMPORTANT - READ BEFORE YOU BEGIN:

After you submit an eComment request, you will receive an email from ferc.gov with a link to the comment system. Your system must not block emails from ferc.gov. Please create your comments in a Word or Text file (up to 6,000 characters) before you begin, then copy/paste them in the eComment Text Box to avoid time-out limits. If you are not filing as an individual or if you are filing a motion to intervene, you must have an eRegistration account and use the Commission's eFiling system.

eComment can only be used to file comments in P, PF, CP, PT, and ET dockets.

Authorize eComment:

Name*:

Street Address*: **

Street Address 2 **

City*:

State*:

Zip Code*: **

E-mail Address*: **

Confirm E-mail Address*: **

Phone: **

Type the characters you see in the picture and click Authorize:



* Denotes Required Field
** Denotes Field will be used by FERC internal staff and not posted to eLibrary.

FERC's eComment Option is limited to individuals filing up to 6,000 characters of text-only comments on their own behalf in the following proceedings:

- Hydroelectric License/Re-license Proceedings (P - Project Number),
- Pre-Filing Activity for Planned Natural Gas Projects (PF Docket),
- Applications for Authorization to Construct a Natural Gas Pipeline, Liquefied Natural Gas (LNG) or Other Facility (CP Dockets),
- Pre-Filing Activity for Permits to Site Interstate Electric Transmission Lines (PT Dockets), and
- Applications for a Permit to Site Interstate Electric Transmission Lines (ET Dockets).

You must have or create a full eRegistration account (not limited to eSubscription) and use the Commission's eFiling system if you are filing:

- On behalf of a company, agency, organization, association, or other non-individual
- A Motion to Intervene
- Comments exceeding 6,000 characters,
- Non-text material (exhibits, photos) or file attachments
- Privileged or Critical Energy Infrastructure Information (CEII).

Title 18, U.S.C. 1001 makes it a crime for any person knowingly and willingly to make to any Agency or Department of the United States any false, fictitious or fraudulent statements as to any matter within its jurisdiction.

FERC Online does not require the submission of personally identifiable information (PII) (e.g. social security numbers, birthdates, and phone numbers), and FERC will not be responsible for any PII submitted to FERC Online, including any accidental or inadvertent submissions of PII.

For any issues regarding FERC Online, please contact FERC Online Support or call Local: 202-502-6652 | Toll-free: 866-208-3676. Please include a current mail address, telephone number, and e-mail address.

²⁹⁴ *Id.*

For comments under 6,000 words, there is no notice regarding the public nature of submitted comments on the actual comment submission page. However, the comments webpage contains one warning, regarding what types of information may be removed from public view:

“NOTE: Comments containing profane, inflammatory, scurrilous, or threatening material will not be placed in public view.”²⁹⁵

Comments under 6,000 words require commenters to enter contact information, however, and the web page (depicted in Figure 4) that collects comment information includes a warning at the bottom:

FERC Online does not require the submission of personally identifiable information (PII) (e.g. social security numbers, birthdates, and phone numbers), and FERC will not be responsible for any PII submitted to FERC Online, including any accidental or inadvertent disclosure.²⁹⁶

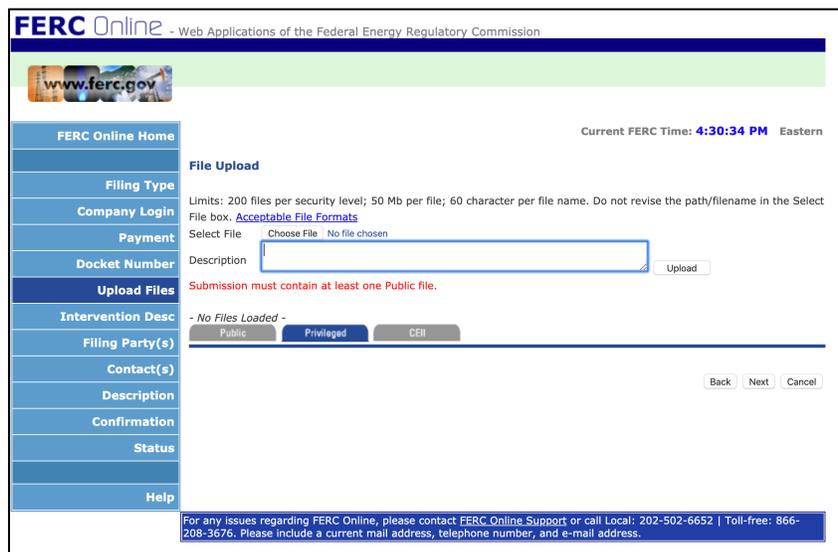
An eFiling, on the other hand, permits comments over 6,000 words in length, and requires documentation, including eRegistration.²⁹⁷ A screenshot of FERC’s eFiling submission page appears in Figure 5.

²⁹⁵ *Quick Comment*, *supra* note 292.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

Figure 5: eFiling Submission Page for the Federal Energy Regulatory Commission



For eFilings, eRegistered users are allowed to designate comments contained in Word documents or other files as “privileged,” as seen in Figure 5.²⁹⁸ The eRegistration form also includes a notice regarding the submission of PII or CBI identical to the notice at the bottom of Figure 4.²⁹⁹

There is no mention on either the eFiling or the eComments webpage regarding challenges to withholding or disclosure decisions.

f. Federal Housing Finance Agency

The Federal Housing Finance Agency (FHFA) also maintains its own website regarding the submission of public comments.³⁰⁰ A screenshot of its comment submission page appears in Figure 6.

²⁹⁸ *eFiling*, *supra* note 293.

²⁹⁹ *Id.*

³⁰⁰ *60-Day Notice of Submission of "Community Support Requirements" Information Collection for OMB Approval*, FED. HOUSING FIN. AGENCY, <https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/60-Day-Notice-of-Submission-of-Members-of-the-Banks-Information-Collection-for-OMB-Approval.aspx#> (last visited Feb 15, 2020).

The submission page does not require any information beyond a name and contains no notice regarding the disclosure of public comments, though it includes links to the FHFA's SORNs that cover correspondence, online forms, and other telecommunications systems.³⁰¹ The website also contains no mention of any disclosure or withholding challenge procedures.

g. Board of Governors of the Federal Reserve System

The Board of Governors of the Federal Reserve System (Federal Reserve), which maintains its own comment submission web page, takes an extra step to ensure that commenters read a privacy notice: when a user navigates to the page to submit comments, a pop-up appears and informs the reader that:

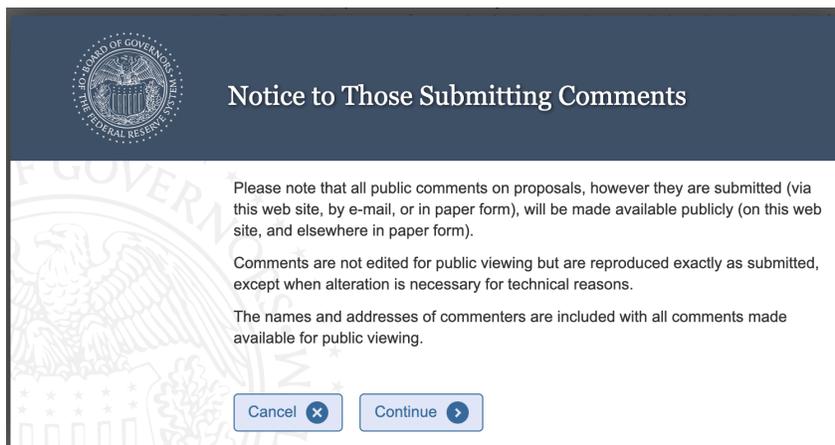
[A]ll public comments on proposals, however they are submitted (via this website, by e-mail, or in paper form) will be made available publicly (on this web site and elsewhere in paper form). Comments are not edited for public viewing but are reproduced exactly as submitted, except when alteration is necessary for technical reasons. The names and addresses of commenters are included with all comments made available for public viewing.³⁰²

A screenshot of this pop-up notice appears in Figure 7.

³⁰¹ *Id.*

³⁰² *Popup to Electronic Comment Form*, FED. RESERVE, https://www.federalreserve.gov/secure/forms/ElectronicCommentForm.aspx?doc_id=R%2D1669&doc_ver=1 (last visited Feb. 15, 2020).

Figure 7: Pop-Up Notice on Comment Submission Page for the Federal Reserve System



On the actual comment submission webpage, there is no additional privacy warning.³⁰³

h. Postal Regulatory Commission

Like other agencies with comment websites, the Postal Regulatory Commission (PRC) requires users to create an account before leaving comments.³⁰⁴ However, the temporary accounts expire in nine days, with permanent online accounts requiring a more formal application.³⁰⁵ The page for online comment submission does not contain a privacy notice regarding CBI or PII, nor does the page detail a process for confidential submission. However, the “How to Participate” page of PRC’s website includes this notice:

Those who want to participate should know that Commission proceedings are judicial in nature. They are typically conducted in accordance with strict rules of procedure, evidence and due process just as in a court of law. Consequently, the more involved one becomes in a proceeding, the more responsibility is entailed for complying with the applicable rules and procedures. In view of this, a knowledgeable public representative is appointed on behalf of the general public to participate in all Commission proceedings and to represent the interests of

³⁰³ *Id.*

³⁰⁴ *Filing Online Login*, POSTAL REGULATORY COMM’N, <https://www.prc.gov/filingonline/login> (last visited Feb. 15, 2020).

³⁰⁵ *How to Participate*, POSTAL REGULATORY COMM’N, <https://www.prc.gov/how-to-participate> (last visited Feb. 15, 2020).

individual consumers. The public representative also may advise first-time participants on the operation of Commission rules of procedure.³⁰⁶

i. Surface Transportation Board

The Surface Transportation Board (STB) maintains its own commenting website to facilitate public commenting.³⁰⁷ This website does not require users to register before leaving comments.³⁰⁸ Though the individual comment page does not include any notice regarding the public disclosure of all comments filed, STB does include a notice on its e-Filings webpage that reads:

NOTE: If the person filing with the Board submits personal information, this information will be publicly available on the Board's website. This published information may include, but is not limited to, the filer's home address, telephone number and email address when the contact information serves as the filer's business contact information.³⁰⁹

j. U.S. International Trade Commission

USITC, as indicated by its *Federal Register* notice, accepts comments on both its website and on Regulations.gov.³¹⁰ The Electronic Document Information System (EDIS) that USITC maintains requires all users to register with EDIS before accessing any submission pages.³¹¹

When submitting a comment through the EDIS, the first question asked beyond the contact information of the submitted is whether the comment "contains CBI or BPI," as depicted

³⁰⁶ *Id.*

³⁰⁷ *Other Filings*, SURFACE TRANSP. BD., <https://prod.stb.gov/proceedings-actions/e-filing/other-filings/> (last visited Feb. 15, 2020).

³⁰⁸ *Id.*

³⁰⁹ *e-Filings*, SURFACE TRANSP. BD., <https://prod.stb.gov/proceedings-actions/e-filing/> (last visited Feb. 15, 2020).

³¹⁰ *Submission and Consideration of Petitions for Duty Suspensions and Reductions*, 84 Fed. Reg. 9,273, 9,273 (Mar. 14, 2019).

³¹¹ *Electronic Document Information System (EDIS)*, INT'L TRADE COMM'N, <https://edis.usitc.gov/external/> (last accessed Feb. 15, 2020).

in Figure 8.³¹² Next, it asks if the submitter’s comment is a “public version of a confidential document filed with the Commission.”³¹³ Only after answering these questions are commenters able to complete their comments, though there is no other notice of the public nature of comments.³¹⁴

Figure 8: Confidential Comment Submission for the U.S. International Trade Commission

The screenshot shows the 'Security Level' section of the EDIS submission process. On the left, a 'Filing' sidebar lists 'Submitter Information', 'Investigation Type', 'New Request', 'Investigation', 'Document Type', and 'Security Level', each with a checkmark. The main content area contains two questions with 'Yes' and 'No' buttons. The first question, 'Does your document contain any CBI/BPI?', has an orange-bordered 'Yes' button and a green-bordered 'No' button. The second question, 'Is your document a public version of a confidential document filed with the Commission?', has a blue 'Yes' button and a blue 'No' button. At the bottom right, there are 'Back' and 'Save and Continue' buttons.

k. U.S. Securities and Exchange Commission

The SEC maintains its own personal commenting website to solicit public participation.³¹⁵ A screenshot of its comment submission page appears in Figure 9.

³¹² *Comments Submission*, INT’L TRADE COMM’N, <https://edis.usitc.gov/external/submission/submissionContainer.html> (last accessed Feb. 15, 2020).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *SEC Proposed Rules*, SECS. & EXCH. COMM’N, <https://www.sec.gov/rules/proposed.shtml> (last visited Feb. 7, 2020).

Figure 9: Comment Submission Page for the U.S. Securities and Exchange Commission

Home | [EDGAR Search Home](#) | [Latest Filings](#) | [Previous Page](#)

U.S. Securities and Exchange Commission

**Submit Comments on S7-03-20
Market Data Infrastructure**

Complete this form to submit your comments. Fields marked with an asterisk (*) are required.

Important: All comments will be made available to the public. Submit only information that you wish to make available publicly. This form should not be used for submitting a tip or complaint (including a whistleblower complaint). If you wish to submit a tip or complaint regarding a potential violation of the federal securities laws, please use our [online form](#), or mail your information to the SEC Complaint Center at the following address: SEC Complaint Center, 100 F Street NE, Washington, D.C. 20549-0213. You can also send a fax to 703-813-6965.

If you would like to submit Microsoft Word, PDF, or WordPerfect files as your comments or as supplementary materials to your comments, you will be able to do so on the next page.

* First Name

Middle Initial

* Last Name

Suffix (if any)

examples:
Jr.
Ph.D.
CPA
Esquire

Professional Affiliation (if any)

examples:
Professor of Economics, University of Providence /or/
Markets Section Chair, Association of Professional Accountants /or/
CEO, Acme Widget Company

City

State / Province

Country

* Email address

Your email address will not be published on the web site

example:
name@domainname.domain

* Comments:

If you are submitting your comment in an attached file, put the words "Comments attached" in the text box. You will be able to attach up to 3 documents after you click "continue."

<https://www.sec.gov/cgi-bin/ruling-comments>

[Home](#) | [EDGAR Search Home](#) | [Previous Page](#) | [Privacy Policy](#) Modified: 11/15/2019

The SEC’s public commenting website includes this language to warn about the public nature of rulemaking comments: “**Important:** All comments will be made available to the public. Submit only information that you wish to make available publicly.”³¹⁶

The SEC website does not publicly detail a method for filing confidential or redacted comments, nor does the SEC website detail a process for further agency consideration regarding decisions on withholding or disclosure.

l. Discussion

Regulations.gov provides useful disclosure of agency policies with respect to disclosure and withholding of CBI and PII. The ability to customize the language accessed through the link for “Alternate Ways to Comment” gives agencies the flexibility to adjust these notices to their different circumstances.

A few notes bear mentioning, however. Much of this information is click through—unless a submitter is affirmatively seeking an alternative way to comment, for example, they are unlikely to encounter any privacy notices or information about confidential submission. Further, because agencies may vary in their additional information, there are inconsistent notices regarding opportunities to submit protected info. Some of the pop-up notices available on other agency-maintained commenting websites like the Federal Reserve are more likely to be seen by commenters, though those notices still fail to contain information about other ways to comment.

Most importantly, however, the inconsistency regarding notice on both the public nature of submitted comments and availability of confidential submission processes may be confusing

³¹⁶ *How to Submit Comments*, SECS. & EXCH. COMM’N (Sept. 10, 2019), <https://www.sec.gov/rules/submitcomments.htm> (emphasis in original).

to commenters. All agencies are subjected to the same regulations regarding public disclosure, so the variation in the notice they provide to commenters is striking. In particular, not every agency provides specific notice that commenters are in fact *waiving* their privacy interests or their ability to claim something as CBI when they submit a public comment.

Some agencies also provide confidential submission processes (either via paper or online). This is likely to confuse some unexperienced, less savvy commenters. The requirement of paper submission is also inconsistent with the legal mandates to promote online participation in rulemaking to the greatest degree possible.

4. *System of Records Notices (SORNs)*

One interview participant and survey respondent suggested that the Systems of Records Notice (SORNs) required by the Privacy Act of 1974 provided commenters with sufficient notice and guidance about the relevant practices and procedures with respect to protected materials. To assess this possibility, the research team reviewed items published in the *Federal Register* to determine how many agencies have issued SORNs governing information submitted in public rulemaking dockets and examined what disclosures, if any, they contained regarding protected materials. The results are summarized in Table 3.

Table 3: System of Record Notices (SORNs) Filed by Agencies Examined Applicable to Comments Submitted During Rulemaking Process

Type	Agencies
Systems for managing comments in public rulemaking dockets	10
Correspondence (including comments submitted to the agency)	1

Ten out of the 43 agencies examined (23%) have published SORNs governing comments submitted in their public rulemaking dockets, as has the Pension Benefit Guaranty

Corporation.³¹⁷ The U.S. Department of Homeland Security (DHS) has issued a SORN about correspondence that applies to “[i]ndividuals who submit inquiries, complaints, *comments*, or other correspondence to DHS,” which if read broadly could apply to comments submitted during a rulemaking proceeding.³¹⁸

Interestingly, 9 agencies who accept rulemaking comments through their own websites have not issued SORNs to cover those records, including the FEC, FERC, FHFA, Federal Reserve, USITC, PRC, SEC, and the STB. The SEC’s website does contain a link to a SORN for comments submitted during Commission hearings.³¹⁹

a. Government-Wide SORN for the Federal Docket Management System (FDMS)

The most important SORN is the government-wide SORN filed by the EPA regarding the Federal Docket Management System (FDMS) designed to manage comments submitted via Regulations.gov.³²⁰ The U.S. General Services Administration (GSA) took over as managing partner of the FDMS on October 1, 2019.³²¹

The FDMS SORN contains important disclosures regarding PII. It acknowledges that “[t]here will be instances when a person using FDMS to submit a comment or supporting materials on a Federal rulemaking must provide name and contact information (e-mail or mailing

³¹⁷ See *infra* Part II.A.4.I.

³¹⁸ Privacy Act of 1974; System of Records, 83 Fed. Reg. 48,645, 48,645 (Sept. 26, 2018).

³¹⁹ Securities and Exchange Commission; Privacy Act of 1974, 41 Fed. Reg. 41,550, 41,562–63 (Sept. 22, 1976) (SEC-15).

³²⁰ Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. 15,086, 15,086 (Mar. 24, 2005), *amended by* Amendment of the Federal Docket Management System (EPA/GOV-2), 78 Fed. Reg. 60,868 (Oct. 2, 2013).

³²¹ Privacy Act of 1974; Systems of Records, 84 Fed. Reg. 53,728, 53,728 (Oct. 8, 2019). As explained above, while GSA has taken over as managing partner of the e-Rulemaking Program, including the FDMS, the new SORN they filed fails to cover any records “pertaining to agency rulemakings.” See *supra* note **Error! Bookmark not defined.** Accordingly, this report analyzes the EPA SORN.

address) as required by an agency, or, a person may have the option to do so.”³²² The SORN further notes that the FDMS necessarily contains information covered by the Privacy Act, including “personal identifying information (name and contact address/e-mail address).”³²³ The SORN explicitly acknowledges agency discretion to withhold or revise comments:

Each agency has the opportunity to review the data it receives as part of its rulemakings. An agency may choose to keep certain types of information contained in a comment submission from being posted publicly, while preserving the entire document to be reviewed and considered as part of the rulemaking docket. . . . Each agency manages, accesses, and controls the information in the FDMS that is submitted to that particular agency and also maintains the sole ability to disclose the data submitted to that particular agency.³²⁴

The FDMS SORN contains boilerplate language not specific to the rulemaking context directing individuals seeking amendment or correction of a record to submit that request to the agency contact indicated on the initial document for which the related contested record was submitted.³²⁵ In rulemaking contexts, this would general entail the agency contact listed within the Federal Register NPRM.

b. Commodities Futures Trading Commission

The Commodities Futures Trading Commission (CFTC) recently modified CFTC-45, its SORN that covers comments received online.³²⁶ Regarding the privacy of information submitted by commenters, both online and otherwise, CFTC explained:

The commenter’s contact information, or other additional personal information voluntarily submitted, is not published on the internet, unless the commenter has incorporated such information into the text of his or her comment. During an informal rulemaking or other statutory or regulatory notice and comment process,

³²² Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. at 15,086.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 15,088.

³²⁶ Privacy Act of 1974; System of Records, 84 Fed. Reg. 17,816 (Apr. 26, 2019).

Commission personnel may manually remove a comment from publication if the commenter withdraws his or her comments before the comment period has closed or because the comment contains obscenities or other material deemed inappropriate for publication by the Commission. However, comments that are removed from publication will be retained by the Commission for consideration as required by the APA, or as part of the Commission's documentation of a comment withdrawal in the event that one is requested.³²⁷

When detailing the types of information included within the system, CFTC emphasizes that they sometimes receive personal information:

The comments or input provided may contain other personal information, although the comment submission instructions advise commenters not to include additional personal or confidential information.³²⁸

The CFTC's SORN also includes information concerning the protection of records from unauthorized access, including agency-wide procedures regarding protecting PII and annual privacy and security trainings.³²⁹ However, those procedures are not detailed.

Finally, the CFTC describes a procedure for contesting any possible records, as is required by the Privacy Act. All those interested in contesting records about themselves within the comment system of records is directed to write to the Office of General Counsel.³³⁰

c. Federal Communications Commission

The FCC's SORN covers its own Electronic Comment Filing System.³³¹ The SORN mentions that, unless confidentiality is requested, all comments are routinely available to the

³²⁷ *Id.* at 17,817.

³²⁸ *Id.* at 17,817-18.

³²⁹ *Id.* at 17,818.

³³⁰ *Id.*

³³¹ Privacy Act of 1974; Systems of Records, 71 Fed. Reg. 17,234 (April. 5, 2006).

public “over the Internet 24 hours a day, seven days a week.”³³² Users who want to contest their records are advised to direct those queries to the system manager.³³³

d. Federal Trade Commission

The FTC’s FTC-I-6 system covers “participation in Commission . . . rulemaking” including those who have left “public comments.”³³⁴ Public comments received regarding FTC rulemakings are maintained by the Federal Docket Management System (as explored above).³³⁵ FTC-I-6 notes that records within the system, including comments, can be disclosed on the FTC’s website, in FTC’s public record, and through the FDMS.³³⁶

e. Pension Benefit Guaranty Corporation

When the Pension Benefit Guaranty Corporation (PBGC) began accepting comments on PBGC.gov, it filed a SORN for PBCG-25.³³⁷ The PBGC notes that the information in the record “may include name, email address, physical address, phone numbers, PBGC customer identification numbers, Social Security numbers, dates of birth, dates of hire, dates of termination, marital status, [and] pay status.”³³⁸ The SORN also clarifies that “information, including PII, contained in comments about agency rulemaking, whether submitted through pbgc.gov or regulations.gov, may be published to the PBGC website.”³³⁹

³³² *Id.* at 17,236-37.

³³³ *Id.* at 17,237.

³³⁴ Privacy Act of 1974; Systems of Records, 73 Fed. Reg. 33,592, 33,601 (June 12, 2008).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ Privacy Act of 1974; System of Records, 82 Fed. Reg. 6,247, 6274 (Feb. 13, 2018).

³³⁸ *Id.* at 6,275.

³³⁹ *Id.*

f. U.S. Department of Defense

DOD has also published a SORN for its Federal Docket Management System.³⁴⁰ As DOD's SORN points out, only individual commenters who voluntarily provide their personal contact information when commenting are covered by the SORN, because anonymous commenters cannot be identified.³⁴¹

DOD notes that their docket management system

permits a member of the public to download any of the public comments received. If an individual has voluntarily furnished his or her name when submitting the comment, the individual, as well as the public, can view and download the comment by searching on the name of the individual. If the comment is submitted electronically using the FDMS system, the viewed comment will not include the name of the submitter or any other identifying information about the individual except that which the submitter has opted to include as part of his or her general comments.³⁴²

However, no other detailed information regarding privacy is included. The SORN also notes that the procedures for accessing or amending records varies between the various DOD components, and directs commenters to each component's regulatory guidance.³⁴³

g. U.S. Department of Justice

DOJ has a published SORN concerning all submissions to the Justice Federal Docket Management System, which covers "any person—including private individuals, representatives of Federal, State or local governments, businesses, and industries, that provides personally

³⁴⁰ Privacy Act of 1974; System of Records, 71 Fed. Reg. 586 (Jan. 5, 2006).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 586.

identifiable information pertaining to DOJ and persons mentioned or identified in the body of a comment.”³⁴⁴

At the outset of the SORN, DOJ notes that if a comment meets all requirements “as determined by DOJ or the component publishing the rulemaking, the comment will be posted on the Internet at the FDMS Web site.”³⁴⁵ The SORN also confirms that the names, identifying information, and full text of all comments will be available for public viewing, but that “[c]ontact information (e-mail or mailing address) will not be available for public viewing, unless the submitter includes that information in the body of the comment.”³⁴⁶

The possibility of redaction is mentioned in the SORN, which notes that a component of DOJ “may choose not to post certain types of information contained in the comment submission, yet preserve the entire comment to be reviewed and considered as part of the rulemaking docket.”³⁴⁷ In particular, the SORN cites “material restricted from disclosure by Federal statute” as the type of information that would be withheld but still considered during the rulemaking process.³⁴⁸

In regard to contesting possible records, DOJ notes that individuals who seek to contest or amend the information “should direct their requests to the appropriate system manager at the address indicated in the System Managers and Addresses section . . . stating clearly and concisely what information is being contested, the reason for contesting it, and the proposed

³⁴⁴ Privacy Act of 1974; System of Records, 72 Fed. Reg. 12,196, 12,917 (Mar. 15, 2007).

³⁴⁵ *Id.* at 12,196.

³⁴⁶ *Id.* at 12,916.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

amendment to the information sought.”³⁴⁹ The Systems Managers listed include a manager for policy issues and one for technical issues.³⁵⁰

h. U.S. Department of Labor

The U.S. Department of Labor (DOL) has a published SORN which covers “any individuals who provides personal information when submitting a public comment and/or supporting materials in response to” rulemaking.³⁵¹ Interestingly, this SORN has the exact same privacy notice regarding the Federal Docket Management System as DOD regarding the public nature of all comments received and confirming that a comment is searchable by the submitter’s name.³⁵² The language of the two agencies’ SORNs is virtually indistinguishable.

i. U.S. Department of the Treasury

The U.S. Department of the Treasury’s (Treasury) published a new e-Rulemaking SORN in January 2020.³⁵³ Treasury begins the SORN by referencing the possible redaction or withholding of certain comments:

During an informal rulemaking or other statutory or regulatory notice and comment process, Department personnel may manually remove a comment from posting if the commenter withdraws his or her comments before the comment period has closed or because the comment contains obscenities or other material deemed inappropriate for publication by the Treasury. However, comments that are removed from posting will be retained by the Department for consideration, if appropriate under the APA.³⁵⁴

³⁴⁹ *Id.* at 12,198.

³⁵⁰ *Id.*

³⁵¹ Privacy Act of 1974; System of Records, 84 Fed. Reg. 57,484 (Oct. 25, 2019).

³⁵² *Id.* at 58,486; *see also supra* note 342 and accompanying text.

³⁵³ Privacy Act of 1974; System of Records, 85 Fed. Reg. 1,198 (Jan. 9, 2020).

³⁵⁴ *Id.*

Treasury notes, however, that other comments are “timely publish[ed] on a website to provide transparency in the informal rulemaking process” under the APA.³⁵⁵

Treasury also explains, when detailing the information collected by the system of records, that commenters sometimes include personal information:

Comments or input submitted to Treasury may include the full name of the submitter, an email address and the name of the organization, if an organization is submitting the comments. The commenter may optionally provide job title, mailing address and phone numbers. The comments or input provided may contain other personal information, although the comment submission instructions advise commenters not to include additional personal or confidential information.³⁵⁶

However, Treasury is not as explicit regarding the public and permanent nature of online comments as other agencies are in their SORN language. Treasury also includes little detail regarding challenges to withholding or disclosure, directing individuals who seek to contest records to inquire with “individual Treasury components.”³⁵⁷

j. U.S. Department of Transportation

DOT has numerous SORNs, including DOT/ALL 14 for public rulemaking dockets maintained on the Federal Docket Management System.³⁵⁸ The DOT SORN includes little detail regarding the mandatory disclosure of public comments, though it notes that the comments are stored “electronically on a publicly accessible website” and are “freely available to anyone.”³⁵⁹ All queries are directed towards the DOT Dockets Program Manager, with no additional details regarding procedures to challenge disclosure or withholding.³⁶⁰

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 1,199.

³⁵⁷ *Id.* at 1200.

³⁵⁸ Privacy Act of 1974; Systems of Records, 73 Fed. Reg. 3,316 (Jan. 17, 2008).

³⁵⁹ *Id.*

³⁶⁰ *Id.*

k. *U.S. Department of Veterans Affairs*

DVA is explicit to note that “the portion of VAFDMS information that comes under the Privacy Act is personal identifying information (name and contact address/email address).”³⁶¹ Not only is this used by DVA to identify commenters, as it notes, but it is also used to allow “clarification of the comment, direct response to a comment, and other activities associated with the rulemaking or notice process.”³⁶² As with the other agencies above, only commenters who voluntarily provide their names and contact information are covered by the SORN.³⁶³

DVA uses similar language to many other agencies when describing which comments will result in the name and contact information of the submitter being displayed:

Unless the individual submits the comment anonymously, a name search will result in the comment being displayed for view. If the comment is submitted electronically using www.Regulations.gov, the viewed comment will not include the name of the submitter or any other identifying information about the individual except the information that the submitter has opted to include as part of his or her general comment. If a comment is submitted in writing, the information scanned and uploaded into VAFDMS will contain the submitter’s name, unless the individual submits the comment anonymously. All comments received will become a matter of public record and will be posted without change to www.regulations.gov including any personal information provided.³⁶⁴

The DVA also notes in the SORN that “personal information about the commenter” may be included in the FDMS.³⁶⁵

³⁶¹ Privacy Act of 1974; Systems of Records, 82 Fed. Reg. 35,872 (Aug. 1, 2017).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* at 35,873.

³⁶⁵ *Id.*

l. Discussion

There is no doubt that regarding a few areas, SORNs provide some degree of notice to the public about agency policies with respect to protected information. In particular, most SORNs emphasize that if a name is provided by the commenter, his or her comment will be publicly searchable online. This information is important, because while website disclaimers and NPRMs mention the public availability of comments, no other notice but the SORNs explicitly detail the fact that comments will be searchable by and associated with the commenter's name, regardless of what language is included in the comment. Additionally, a few SORNs, including that of the Treasury, explain that even comments removed from the public rulemaking record will be included in the required rulemaking docket submitted for judicial review under the APA.

At the same time, SORNs lack important information regarding public disclosure of comments. In particular, because SORNs are only required for systems of records that are searchable by name or other personal identifiers, they generally focus only on comments where a submitter has voluntarily provided their own contact information—not where a submitter may have attempted to comment anonymously but inadvertently revealed important details about themselves in the body of the comment. SORNs focus mostly on contact information without providing any detailed guidance regarding PII or CBI.

In addition, SORNs are not easy to find. Unlike the NPRMs, which most commenters likely to consult before leaving a comment, SORNs are often included on one isolated page of an agency's website (which contain lists that are sometimes incomplete and hard to reference) and published infrequently in the *Federal Register* when updates are necessary. The fact that agencies have their own classification methods regarding systems of records adds to the confusion. While the agencies mentioned above explicitly refer to electronic rulemaking and

comments in their SORNs, other agencies may rely on general correspondence SORNs to cover this category of records. Although the SORNs provide important information about policies regarding handling of comments, commenters are less likely to encounter them than they are to encounter NPRMs or notices on an agency web page.

5. *Surveys, Negotiated Rulemakings, Ex Parte Communications, and Regulations*

The survey conducted by the research team also identified a number of other methods that agencies use to communicate their policies with respect to disclosing and withholding protected information. Four agencies reported giving advance guidance regarding their policies with respect to protected materials when administering surveys. Two agencies provided the detail that they included that notice within the survey instrument itself

Two agencies reported that they provide advance notice regarding their policies of submitting CBI and PII before information is submitted during a negotiated rulemaking, although neither agency provided any detail about their specific practices. One interview subject similarly reported giving such disclosures, but was surprised by how much proprietary information participants disclosed.

Two other agencies reported that they provide advance guidance as to their policies regarding the disclosure of protected materials in ex parte communications, but neither agency chose to elaborate on the precise nature of that advanced guidance.

One survey response also cited general reliance on its publicly available agency regulations on disclosure as advance guidance and notice to parties potentially submitting

information. Similar references occur in NPRM language issued by the FTC³⁶⁶ and the CFTC³⁶⁷ and in language provided by the FDA in the “Alternative Ways to Comment” link in Regulations.gov.³⁶⁸

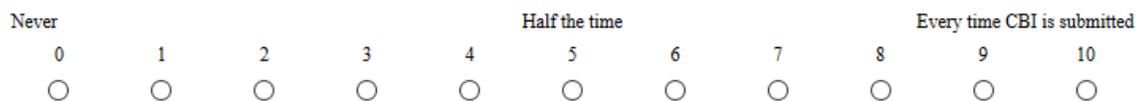
Still another agency reported including an additional statement regarding the submission of information on the page of its website where it provides a link to Regulations.gov. As noted above, the FCC also provides guidance on other portions of its website.³⁶⁹ NPRMs issued by the EPA similarly point to guidance on its website.³⁷⁰

B. Type and Frequency of Submission of Protected Materials

Another section of the survey sent to agencies was designed to measure the types of protected materials they received and with what frequency. Agencies were asked separately about CBI and PII. They were also asked how often they encounter protected materials about third parties on a scale from 0 to 10, as shown in Figure 10.

Figure 10

Of the types of CBI that your agency receives through public comments, how often is the information submitted about a third party, rather than about the submitter?



The caption above this scale characterizes 0 as “never” and 10 as “Every time CBI is submitted.”

The natural way to read this scale is to interpret a response of 0 as 0% of the time and to interpret

³⁶⁶ See *supra* notes 236 and accompanying text.
³⁶⁷ See *supra* notes 246–247 and accompanying text.
³⁶⁸ See *supra* notes 265–267 and accompanying text.
³⁶⁹ See *supra* notes 285–287 and accompanying text.
³⁷⁰ See *supra* notes 243–244 and accompanying text.

a response of 10 as 100% of the time, with each number in between corresponding to a 10% increase in frequency.

1. *Confidential Business Information (CBI)*

The first portion of the survey asked agencies what types of CBI they encountered over the course of rulemaking. The survey responses to are summarized in Table 4:

Table 4: Types of CBI Encountered in Rulemaking Proceedings

Type	Responses
Total affirmative responses	13
Trade secrets	7
Financial regulatory information	6
Other	8

Thirteen of the 27 survey responses (48%) and 11 of the 23 agencies responding to the survey (41%) indicated that they receive sometime of CBI in rulemaking proceedings. Three interview subjects indicated that CBI can interfere with ability to justify rules, as the obligation not to disclose that information to the public effectively forecloses the agency from relying on it as the basis for its action. One agency noted that commenters request CBI status only a handful of times a year. Another agency reported that the increasing competitiveness of the business environment have caused requests for confidentiality to increase.

Of the 13 agencies that reported encountering some type of CBI during rulemaking proceedings, 7 agencies reported that they encountered trade secrets (26% of all submissions, 54% of submissions reporting encountering CBI); 6 agencies reported that they encountered financial regulatory information, such as Form 8-Ks and 10-Ks (22% of all submissions, 46% of submissions reporting encountering CBI); and 8 agencies reported that they received “Other kinds of CBI” (30% of all submissions, 62% of submissions reporting encountering CBI).

Agencies reported encountering the following five types of CBI as falling within this catchall category, with the frequency indicated in parentheses:

- Strategic documents (2).
- Personal bank account and financial information, including bank statements (2).³⁷¹
- Pricing, cost, operational and revenue data and methodologies (1)
- Marketing and sales information (1).
- Financial data that does not satisfy the legal definition of a “trade secret” (1).

One of the agencies indicating that it received strategic documents described them as including competitive strategy and market share.

The survey also asked agencies how often they encountered CBI about a third party. The results are reported in Table 5.

Table 5: Frequency with Which Agencies Encounter CBI about Third Parties in Rulemaking Proceedings

Frequency	Responses
Never	8
10% of the time	3
20% of the time	2

When asked how often this information was about a third party, 8 of the 13 respondents who reported encountering CBI replied that they never receive CBI about a third party (30% of all submissions, 62% of submissions reporting encountering CBI). Three agencies rated the frequency of receiving CBI from a third party as a 1 on a scale of 1 to 10 (11% of all submissions, 23% of submissions reporting encountering CBI), and 2 agencies reported it as a 2 (7% of all submissions, 15% of submissions reporting encountering CBI). If these data points are combined to form a weighted average, the survey responses suggest that the average agency

³⁷¹ Note that in some situations, personal bank information and bank statements may also be considered PII. In this context, the agencies submitted these answers in the section regarding CBI, so Table 5 reports their answers as received.

encounters CBI about third parties roughly 5% of the time. As explored below, agencies report that they encounter CBI about third parties much less frequently than PII about third parties.

2. *Personally Identifiable Information (PII)*

The research team asked agencies what types of PII they encounter during rulemaking proceedings. The survey responses are summarized in Table 6:

Table 6: Types of PII Encountered in Rulemaking Proceedings

Type	Responses
Total affirmative responses	17
Social Security numbers	8
Medical information	7
Other	15

Seventeen of the 27 survey submissions (63%) and 16 of the 23 agencies responding to the survey (69%) indicated that they receive some type of PII in rulemaking proceedings. Of the 17 agencies that reported encountering some type of PII during rulemaking proceedings, 8 agencies reported encountering Social Security numbers (35% of all submissions, 47% of submissions reporting encountering PII); 7 agencies reported encountering medical information during rulemaking (30% of all submissions, 41% of submissions reporting encountering PII); and 14 agencies reported that they received “Other kinds of PII” (61% of all submissions, 82% of submissions reporting encountering PII). Agencies reported encountering the following 6 types of PII as falling within this catchall category, with the frequency indicated in parentheses:

- Contact information (including names, home addresses, phone numbers, and email addresses) (10).
- Dates of birth (4).
- Employment/salary information (2).
- Marital status (1).
- Information about dependents (1).

- Alien registration number (1).
- Photocopies of passports, bank statements, and drivers' licenses (1).
- Information about security clearances (1).

The survey also asked agencies who reported receiving PII how often they encountered PII about a third party. The results are reported in Table 7.

Table 7: Frequency with which Agencies Encounter PII about Third Parties in Rulemaking Proceedings

Frequency	Responses
Never	6
10% of the time	2
20% of the time	4
30% of the time	1
40% of the time	1
90% of the time	3

Six of the 17 respondents (35%) and 16 agencies who responded to this question stated that they never receive PII about a third party. Two agencies (12%) rated the frequency of receiving PII from a third party as a 1 on a scale of 1 to 10; 4 agencies (24%) rated it as a 2; 1 agency (6%) rated it at a 3; 1 agency (6%) rated it as a 4; and 3 agencies (17%) rated it as a 9. If these responses are combined to form a weighted average, the survey responses suggest that the average agency encounters PII about a third party 16% of the time.

The type of PII that agencies encounter clearly depends on the subject matter under their jurisdiction. For example, one agency with jurisdiction over a subject matter that does not routinely implicate personal matters reported that it did not recall ever receiving PII about a third party, while agencies whose authority directly covers subject matter that almost always involve PII report much higher frequencies.

The survey responses suggest that information about third parties is submitted far more frequently for PII than CBI. Agencies generally recognized that screening for certain types of

PII, such as Social Security numbers, is relatively straightforward. Two agencies expressed concern about the ability to screen for other types of third-party information.

C. Agency Processes for Dealing with Protected Materials

A number of survey and interview questions were designed to learn more about agencies processes for dealing with protected materials. Prominent issues included the frequency and standards used for screening for CBI and PII, procedures for reviewing requests for confidentiality, techniques of facilitating meaningful review of protected materials, and procedures for challenging decisions regarding protected materials.

1. Frequency of Screening for CBI and PII

The survey asked respondents whether their agency screened information submitted for CBI and PII. The results are summarized in Table 8.

Table 8: Whether Agency Screens for CBI and PII

Type	Responses
Yes	13
No	5

Of the 18 responses representing 17 agencies that answered the question, 13 reported that they screen some submissions for CBI and PII (72%), while 5 indicated that they did not (28%). Two survey responses affirmatively indicated that they conduct no screening of public comments in the absence of a confidentiality request. One of the responses who indicated that they screened for CBI/PII clarified that they did not screen public comments, only other types of submitted information.

The survey also asked what methods these agencies used to screen comments for CBI and PII. The results are summarized in Table 9.

Table 9: Methods for Screening for CBI and PII

Type	Responses
Total affirmative responses	9
Agency employees	8
Independent contractor	4
Artificial intelligence	1
Other	0

Eight of the 9 agencies (89%) who answered questions about who performed the screening reported using agency staff to screen dockets. Four agencies reported using contractors (44%). Only 1 agency reported relying on using artificial intelligence (AI) to screen (11%). One agency reported that “most” agencies have docket scanners, either contractors or staff, who screen for PII and then exclude it from the docket. One agency reported that secretary’s office or the web group performs screening for the agency instead of the rulemaking staff.

Agencies have reported changes in their screening methods over time. For example, 1 agency described feeling “disconnected” from the commenting process when contractors managed the docket and switched back to using agency staff to obtain a better feel for the timing and the substance of the comments. Another agency reported that they are currently considering using AI to screen for confidential and personal information along with abusive comments.

The survey also asked how frequently agencies excluded comments containing CBI and PII from their public rulemaking dockets. The results are summarized in Table 10.

Table 10: Frequency with Which Agencies Exclude PII or CBI from Public Rulemaking Dockets

Frequency	Responses
Never	3
10% of the time	7
20% of the time	3
50% of the time	2
70% of the time	1
90% of the time	1

Three of the 17 survey respondents (18%) reported that they never receive PII or CBI from a public rulemaking docket. Seven respondents (41%) reported making such exclusions 10% of the time. Two respondents (12%) reported making such exclusions 20% of the time, while another 2 (12%) reported doing so 50% of the time. Finally, 1 survey respondent (6%) reported making such exclusions 70% of the time, while another 1 respondent (6%) reported doing so 90% of the time. If these responses are combined to form a weighted average, the survey responses suggest that the average agency excludes PII or CBI 23% of the time. The skewness of the distribution suggests that certain agencies make such exclusions much more frequently than others.

Because Regulations.gov and other websites allow electronic filing, however, some agencies expressed concerns that requiring screening or scrubbing of every comment for CBI or PII would “paralyze” the system by focusing all agency resources towards screening comments and slowing down rulemaking. As explored below, this worry of additional burden permeated most conversations the research team had with agencies.

2. *Standards for Screening for CBI and PII*

Regarding the substance of screening criteria, one interview subject indicated that it has no written policy. Most agencies reported giving screeners some level of guidance as to how to

screen for CBI and PII. The guidance varied in its level of specificity. Five agencies reported specifically instructing screeners to redact information such as Social Security numbers, dates of birth, driver’s license and other similar identification numbers, passport numbers, financial account numbers, and credit/debit card numbers. Two agencies advise staff to redact addresses and phone numbers. One agency reports advising staff to redact medical records. One agency advises staff screening for CBI to look for copyrighted materials, trade information, and commercial and financial information.

Up until 2015, the FDA did not publicly post comments submitted by individuals in their individual capacity on Regulations.gov—only comments of those representing organizations, corporations, or other entities.³⁷² When the FDA changed this long-standing practice in 2015, it cited “transparency and public utility of FDA’s public docket” as the major reason for the change.³⁷³

But the FDA provided another important notice when announcing this change. It explained that the process of routinely reviewing all comments for “obvious confidential information” is “no longer feasible given the volume of comments FDA receives and the adoption of a government-wide electronic portal system for submitting and posting comments.”³⁷⁴ The FDA’s initial reason for withholding individual comments was based largely on the concern of inadvertent personal disclosure by commenters.³⁷⁵ In light of this new policy, the FDA explains:

The commenter is solely responsible for ensuring that the submitted comment does not include any confidential information that the commenter or a third party

³⁷² Consumer Comments—Public Posting and Availability of Comments Submitted to Food and Drug Administration Dockets, 80 Fed. Reg. 56,469 (Sept. 18, 2015).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

may not wish to be posted, such as private medical information, the commenter's or anyone else's Social Security number, or confidential business information, such as a manufacturing process. If a name, contact information, or other information that identifies the commenter is included in the body of the submitted comment, that information will be posted on <http://www.regulations.gov>. FDA will post comments, as well as any attachments submitted electronically, on <http://www.regulations.gov>, along with the State/Province and country (if provided), the name of the commenter's representative (if any), and the category selected to identify the commenter (e.g., individual, consumer, academic, industry).³⁷⁶

The FDA also describes a confidential submission process, the details of which will be published in the NPRMs appearing in the *Federal Register*:

The Agency expects that only in exceptional instances would a comment need to include private, personal, or confidential information. If a comment is submitted with confidential information that the commenter does not wish to be made available to the public, the comment would be submitted as a written/paper submission and in the manner detailed in the applicable Federal Register document. For written/paper comments submitted containing confidential information, FDA will post the redacted/blacked out version of the comment including any attachments submitted by the commenter. The unredacted copy will not be posted, assuming the commenter follows the instructions in the applicable Federal Register document. Any information marked as confidential will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law.³⁷⁷

The screening processes employed by other agencies tend to be rather informal. Four agencies described a brief screening process for CBI and PII that did not appear to follow any specific set of guidelines. Those agencies were merely on the lookout for “sensitive” or “confidential” information. Another agency reported that while they have no written policy regarding what to do when confronted with a comment containing potentially sensitive information, they generally tend to block out Social Security numbers for Regulations.gov. One agency explained that when encountering third-party information, a staffer's immediate first

³⁷⁶ *Id.* at 56,469-70.

³⁷⁷ *Id.* at 56,470.

action would be to designate the comment as “do not post” and start a process of evaluation with FOIA counsel. A lack of “resources,” as one agency explained, has also led at times to very infrequent application of certain informal policies: 100,000 comments are much less likely to get scrutinized for sensitive information, for example, than ten comments. A few interview subjects also noted that though they may screen comments on Regulations.gov, they may still include that information in some form on the administrative record.

Only 1 survey respondent reported offering formal training for screening staff. That agency reported conducting mandatory privacy training annually for all agency staff and additional individual training for all docket staff on how to recognize and redact PII. That agency further provided agency experts and attorneys who could work with docket screening staff to consult on CBI and PII issues. As noted above, the SORN for the CFTC also specifically requires annual privacy and security training.³⁷⁸

Regarding the need for such guidance, agency views were mixed. On the one hand, one interview subject expressed concern about individual agency staff basing decisions regarding redaction on their own conception of what should be private. Another interview subject expressed support for the idea of giving agency staff guidance as to what information should be withheld. On the other hand, a third interview subject reported that his agency does not see the need for more policies.

3. *Procedures for Reviewing Requests for Confidentiality*

As noted earlier, the research team’s review of the NPRMs employed by agencies examined disclosed that 8 of the 43 agencies’ (19%) NPRMs disclosed to commenters the

³⁷⁸ See *supra* notes 329 and accompanying text.

opportunity to request treating portions of their comments as confidential.³⁷⁹ Two of the 27 survey responses (7%) indicated the same.

In some cases, agency regulations reveal how those requests are handled. FTC’s NPRM notes FTC Rule 4.9 gives the authority to decide whether to grant a request for confidential treatment up to the General Counsel.³⁸⁰ Rule 4.9(c) specifies that “[t]he General Counsel or the General Counsel’s designee will act upon such request with due regard for legal constraints and the public interest” and that no material contained in such a request “will be placed on the public record until the General Counsel or the General Counsel’s designee has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law.”³⁸¹

As noted earlier, the NPRMs issued by the CFTC point to agency rules that describe a slightly more extensive process for handling requests for confidential treatment.³⁸² The rules assign the responsibility for making the initial determination to the Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance or his or her designee.³⁸³ The Assistant Secretary or his or her designees must inform commenters who have their request for confidential treatment denied in whole or in part of their right to appeal that decision to the CFTC General Counsel.³⁸⁴ Any such appeal must be made in writing and must be decided within 20 days.³⁸⁵ The General Counsel may refer appeals to the full Commission.³⁸⁶

Some interview subjects offered that these systems can be abused and that agencies often find themselves in situations where they are pushing back against overinclusive confidentiality

³⁷⁹ See *supra* Part II.A.1.c.

³⁸⁰ See *supra* note 236 and accompanying text.

³⁸¹ 16 C.F.R. § 4.9(c)(1).

³⁸² See *supra* note 247 and accompanying text.

³⁸³ 17 C.F.R. § 145.9(f)(1).

³⁸⁴ *Id.* § 145.9(f)(2).

³⁸⁵ *Id.* § 145.9(g)(1), (7).

³⁸⁶ *Id.* § 145.9(g)(3).

requests from businesses. As a few agencies expressed in interviews, oftentimes businesses handing over information request confidentiality to the point where it is “impossible” to go through the documents and information page by page to decide what is confidential. Some companies have begun requesting confidentiality for almost everything they file, even in situations where much of the information being submitted is not “competitively sensitive.” Another agency noted that many items “marked as confidential business information” by the submitter come from law firms.

Interview subjects report that agency staff who want to rely on certain information in writing an order can struggle when that information is confidential. Dissatisfied with the admonition, “Trust us based on an appendix we included that you cannot see,” members of the public often push back through FOIA requests and other litigation. Because of this, one agency actually explained that it seeks to dampen or eliminate confidential comments, if possible. The more public information, after all, makes for easy rule-writing decisions.

One agency noted that assertions of confidentiality are growing more frequent and described the lengthy process it must undergo to challenge an assertion of confidentiality: when a party requests confidential treatment, it is treated as such until the agency rules otherwise. If the agency does rule otherwise, the party has another ten business days to seek review by the full commission, and then ultimately has ten days to seek a stay in court. Only after that whole process has run its course is the purported confidential information made public. While this agency is sensitive to the fact that once CBI is made public, it is public forever, it notes how “cumbersome” and at times “paralyzing” the process can be.

4. *Techniques for Facilitating Meaningful Public Comment on Protected Materials*

Agencies that withhold protected materials must confront another a problem: how do they report enough information to explain their rulemaking processes while still protecting commenters' privacy? The survey specifically asked agencies what techniques they used to facilitate meaningful public comment regarding CBI and PII that have been withheld. The results are summarized in Table 11.

Table 11: Techniques for Facilitating Meaningful Public Comment Regarding CBI and PII That Have Been Withheld

Type	Responses
Total affirmative responses	11
Redaction	8
Aggregation	6
Anonymization	5
Other	2

Of the 11 responses to this question, 8 agencies (73%) indicated that they used redaction. Six agencies (55%) said that they employed aggregation. Five (45%) relied on anonymization. 2 (18%) used other means: specifically redacting only the name and address and contacting the submitter to request withdrawal of the comment.

The survey indicates that redaction is the most common technique that agencies use to balance their obligation to disclose as much information as possible against their duty to protecting certain types of information. But redaction can present problems: as one agency explains, there are some types of information where other facts can be inferred if the public is given pieces.³⁸⁷ Another agency explains that it uses redaction to protect information in

³⁸⁷ This mirrors the analysis under FOIA Exemption 4.

comments, but if a court had an issue with a redacted comment, it would seek a protective order. According to that agency, no court has ever had an issue with a redacted comment so long as it was able to review the unredacted document *in camera*.

The second most common technique is aggregation. As explained by one agency, aggregation can be used to protect information from disclosure to the government as well as to the public. This agency retains outside private consultants operating under nondisclosure agreements to gather information from a variety of companies and uses the aggregated data to create a spreadsheet that is submitted to the government. By virtue of this aggregation process, no other information can be disclosed to the public even after a FOIA request. Aggregation is not limited to data, either. Another agency explained that it will not always post every comment or the exact language of every comment when explaining a Final Rule, but will explain that it received a certain number of comments with the same general message. This is especially common in group filings, where a large number of people will all submit one comment together.

Five agencies use anonymization, such as reporting comments without indicating who left the comment. Note that Regulations.gov, which a vast majority of agencies use to collect comments, does not require commenters to submit a name. The SEC and FCC comment websites, on the other hand, do require names. Even for these websites, however, “Anonymous” or another pseudonym can be used to leave comments, though it is unclear the extent to which agencies who require names review these comments.

Interviews with agency officials revealed still other techniques. One agency includes smaller parts of confidential information in a public docket or notice of a final rule so that they can include it in their analysis. Another agency files some aspects of the record under seal. In that situation, the sealed information can be disclosed as part of the record without the agency

having to say exactly what it was. Still, in these cases there is still undisclosed information that the public cannot see.

5. *Procedures for Challenging Decisions to Disclose or Withhold Protected Materials*

The survey asked respondents whether their agency has a review process for challenging decisions regarding the disclosure or withholding of CBI or PII from its public rulemaking docket. The results are summarized in Table 12.

Table 12: Whether the Agency Has a Review Process for Challenging Decisions Regarding the Disclosure or Withholding of CBI or PII from Its Public Rulemaking Docket

Type	Responses
Process for Challenging Disclosure	6
Process for Challenging Withholding	4

Six of the 7 agencies that responded to this question (86%) indicated that they had a process for challenging decisions regarding disclosure, while 4 (57%) indicated that they had a process for challenging decisions regarding withholding. A closer look at these survey responses reveals that three agencies have a set process to challenge disclosure, one agency has a set process for challenging withholding, and three agencies have set processes for both.

Of the 4 agencies with processes to challenge withholding, 2 rely on the Freedom of Information Act (FOIA) request and appeal process, 1 applies a similar process that allows challenges of withholding decisions via motion, and 1 agency has a specific codified process that relies, in part, on FOIA interpretations.

Of the 6 agencies that have set processes for challenges regarding the decision to disclose, 1 agency allows requests to remove comments from the docket. Ombudsmen are often available at agencies to help with general complaints, and agency interviews indicated that

contacting the Ombudsman would be a proper avenue to request that PII contained in a comment to be taken down. One agency allows commenters to comment and request that his or her PII be displayed, if it was redacted.

The survey also included questions about how frequently these types of challenges are brought. The results are summarized in Table 13.

Table 13: Frequency with Which Commenters Challenge Decisions Regarding Disclosure and Withholding of CBI or PII

Frequency	Disclosure	Withholding
Never	12	12
10% of the time	2	2
20% of the time	1	1

Twelve of the 15 agencies (80%) that responded to this question indicated that challenges to decisions about both disclosure and withholding never occur. Two of the 15 agencies (13%) reported that challenges to decisions about both disclosure and withholding occur 10% of the time. One of the 15 agencies (7%) reported that challenges to decisions about both disclosure and withholding occur 20% of the time, with those challenges focusing on CBI, not PII. If these data points are combined to form a weighted average, the survey responses suggest that the average agency faces challenges to disclosure and withholding with about the same frequency and that each occurs roughly 3% of the time.

A major thread throughout our interviews was the ability of agencies to both facilitate meaningful public comment and explain their regulations made partially on CBI or PII. But when information is withheld, it can pose problems for agencies attempting to satisfactorily justify their decisions under a 5 U.S.C. § 553(c) general statement or when undergoing arbitrary and capricious review under 5 U.S.C. § 706(a). As one agency put it when the research team

interviewed them, when some data is classified, what should it do if it has information justifying a regulatory decision that it cannot make public?

III. FINDINGS AND RECOMMENDATIONS

The legal analysis and empirical assessment of existing agency practices suggest that agencies are making sincere efforts to strike the proper balance between the duty to make government decisionmaking processes as open and transparent as possible on the one hand and the recognized need to protect certain types of sensitive materials on the other hand. Agency practices with respect to protected materials, reflect considerable variation.

The public rulemaking process would likely benefit from greater harmonization of practices across agencies with respect to policies regarding protected materials. At the same time, differences in the frequency with which agencies encounter CBI and PII and variations in the extent to which agencies depend on access to these materials in order to fulfill their mission favor according agencies a considerable degree of flexibility in striking the proper balance between their duties to disclose and withhold protected materials.

A. Recognition of a Strong Default Presumption in Favor of Disclosure

As noted earlier,³⁸⁸ all decisions regarding the treatment of protected materials must proceed from, in the words of the Supreme Court, a “strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents.”³⁸⁹

³⁸⁸ See *supra* notes 156–158 and accompanying text.

³⁸⁹ U.S. Dep’t of State v. Ray, 502 U.S. 164, 173 (1991); accord Dep’t of Air Force v. Rose, 425 U.S. 352, 360–61 (1976) (recognizing that FOIA’s “basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language’” (quoting S. REP. NO. 89-813, at 3 (1965))).

The interest in disclosure is particularly strong in the context of rulemaking, where information about commenters, such as their names and addresses, can greatly contribute to the public's understanding of government processes.³⁹⁰ Agency policies should thus favor disclosure of protected materials in the absence of a strong justification for protection.

However, there may be some instances where an agency feels it must withhold material information, whether it involves situations in which third-party PII was submitted and is relied upon or cases in which CBI is ultimately crucial to the decision making process. In those situations, if redaction, anonymization, and aggregation would not be sufficient, the statement of basis and purpose accompanying the final rule required by the APA³⁹¹ should inform the public of the general nature of the information being withheld.

B. The Inclusion of Language in All NPRMs Disclosing Agency Policies Regarding Protected Materials

NPRMs represent the document that members of the public are most likely to consult before submitting their comments. Indeed, it is hard to imagine how someone could offer relevant comments to a rulemaking proceeding without referring to the material presented in the NPRM.

The research into agency practices suggests that NPRMs represent agencies' primary mechanism for informing prospective commentators about their policies with respect to protected materials. Although the NPRMs issued by the vast majority of administrative agencies disclose some important aspects of these policies, they are far from uniform in this regard.

³⁹⁰ See *supra* notes 182–185 and accompanying text.

³⁹¹ See *supra* note 22 and accompanying text.

Making sure that all NPRMs contain language addressing the issuing agency's policies on certain key issues would provide better notice and guidance to prospective commentators. The key elements include

- Notice about policies regarding publication of comments, such as whether they are generally posted to the website without review and cannot be changed or whether they are routinely screened before publication.
- Specific guidance to avoid submitting PII in the body of comments unless the PII is about the submitter and the submitter is completely aware of the disclosure consequences. This guidance should explain that submitting PII entails a waiver of the submitter's privacy interest in that material.
- Specific guidance not to submit CBI in comments unless using the available alternative mechanisms for submitting confidential information, and notice that submitting such CBI publicly likely entails a waiver of confidentiality.
- Guidance about alternative mechanisms for submitting confidential information.
- Notice that the agency reserves the right to redact any submissions in part or in full when making comments available to the public.
- Notice about opportunities to challenge decisions about disclosing or withholding information submitted in comments and information about how individuals can avail themselves of those processes.

Model disclosure language based on the best current agency practices appears in Appendix D. Agencies should have wide latitude to modify these disclosures to fit their particular needs.

C. The Inclusion of Language on Comment Submission Websites Disclosing Agency Policies Regarding Protected Materials

Websites that accept comments in public rulemaking proceedings should provide notice about the same policy practices listed in the discussion of NPRMs. Sample language, adapted from language appearing at the bottom of the comment submission page on Regulations.gov, could read:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. **Do not submit information whose disclosure is restricted by statute**, such as trade secrets or commercial and financial information, via [the online

commenting platform]. **Do not submit sensitive personal information**, such as social security numbers or banking information, **or confidential business information, such as trade secrets**, via [the online commenting platform]. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the [link to detailed information about submitting paper or email comments], the Federal Register notice on which you are commenting, and the [Web site of the Department or Agency].

This language places the key warnings on the primary comment page and simplifies the current disclosure by replacing dual links to the “Privacy Notice” and the “User Notice” with a single notice at the bottom of the page. The inclusion of this language and the retention of the link for “Alternate Ways to Comment” gives agencies flexibility in tailoring these notices to their particular circumstances. Although other critical information remains hidden behind a link, it presents the most important information in a way likely to be read by potential commenters without overburdening them. Although pop-up notices of the type employed by the Federal Reserve are better at ensuring that the notice is seen by commenters, they may present a burden that reduces the total number of comments—however, given the relative ease of incorporating pop-ups on an agency websites, they still ensure a significant amount of commenters at least see the notice.

D. The Provision of Guidance on How to Submit Comments Containing Confidential Information and the Possible Creation of a Process for Online Submission

One of the most striking areas where agency practices differed is with respect to disclosure of methods other than general online comments that permit the submission of confidential information. As noted earlier, the review of NPRMs issued by agencies examined indicated that only 21% included language about alternative submission systems.³⁹²

³⁹² See *supra* Table 2.

In addition, 4 agencies require that comments containing requests for confidential treatment must be made in writing.³⁹³ Continuing reliance on paper submission runs counter to the mandates in the E-Government Act of 2002 and Executive Order No. 13,563 to promote online submission of rulemaking comments.

As noted above, agencies should make sure that their NPRMs and comment submission websites provide adequate guidance regarding alternative mechanisms for submitting confidential information.³⁹⁴ The mechanism can reflect either of the two primary mechanisms for permitting the submission of protected information: (1) the inclusion of a prominent notice at the top of the comment along with identification of the information to be redacted³⁹⁵ or (2) the submission of both redacted and unredacted versions of the comment.³⁹⁶

In addition, comment submission websites should consider redesigning their submission pages to enable commenters submit confidential information without waiving confidentiality.

E. The Lack of Clear Benefit from Revising SORNs to Include Policies Regarding Protected Materials

Many of the arguments for including information regarding policies regarding protected materials in NPRMs and comment submission websites also apply to SORNs. Some agencies indicated that they relied on SORNs to inform prospective commenters about their policies.³⁹⁷ In addition, the survey of SORNs regarding docket management systems revealed that the specific

³⁹³ See *supra* notes 236, 241, 244 and accompanying text.

³⁹⁴ See *supra* Part III.A–B.

³⁹⁵ See *supra* notes 236, 239 and accompanying text.

³⁹⁶ See *supra* notes 240, 244 and accompanying text.

³⁹⁷ See *supra* Table 1.

practices disclosed varied widely, even including disclosures that are not made elsewhere, and might benefit from greater uniformity.³⁹⁸

Other considerations make SORNs unlikely candidates for informing the public. The statutory definitions limiting SORNs to systems searchable by name or other personal identifiers make them poorly situated to protect materials submitted in anonymous comments or submitted about parties other than the commenter. The difficulty in locating SORNs makes commenters more likely to consult NPRMs, agency websites, or agency regulations. As a result, revision of SORNs to provide more complete disclosures of policies regarding protected materials is likely to provide limited benefit. Because the SORNs provide significant detail regarding the maintenance and use of information collected through commenting portals, the research team also recommend referencing the SORNs in an NPRM.

F. The Lack of Need to Screen Public Rulemaking Dockets for CBI When the Commenter Has Not Requested Confidentiality

The analysis of the legal requirements suggests that agencies need not undertake additional efforts to screen materials contained in public rulemaking dockets for CBI for which the submitter has not requested confidential treatment. Separate issues are presented by CBI that belongs to the party submitting the comment (called for purposes of this report “first-person CBI”) and CBI that belongs to parties other than one submitting the comment (called for purposes of this report “third-person CBI”).

Regarding first-person CBI, the standard for confidentiality established Supreme Court’s recent 2019 decision in *Food Marketing Institute v. Argus Leader Media*³⁹⁹ essentially dictates

³⁹⁸ See *supra* Part II.A.4.m.

³⁹⁹ 139 S. Ct. 2356 (2019).

that any CBI submitted in a rulemaking docket without a request for confidentiality is not covered under FOIA Exemption 4. As noted earlier,⁴⁰⁰ this standard currently requires that the information be both “closely held,” though the Court declined to determine whether it *must* be disclosed only under express or implied assurances of nondisclosure in order to be regarded as confidential.⁴⁰¹ When the agency has notified commenters that any CBI submitted in comments without a request for confidential treatment will be disclosed to the public, subsequent disclosure of CBI submitted without such a request does not constitute the type of forced breach of good faith promises of nondisclosure by the government that Congress had in mind when it enacted FOIA.⁴⁰² In addition, clear warnings that any CBI submitted in comments without a request for confidential treatment will be disclosed to the public would make any inference of assurances of confidentiality unreasonable and would likely constitute a waiver of any rights to confidentiality.⁴⁰³

Third-person CBI presents a somewhat more complicated question. The submission of CBI without a request for confidentiality by someone other than the owner of that CBI can hardly be considered a waiver. In addition, the failure to seek assurances of confidentiality for the CBI can hardly be attributed to the owner when another party was responsible for making it part of the rulemaking docket. However, the access that the submitter had to the third-party CBI also indicates that the information may not be “closely held,” since other parties are aware of it, thus making the information ineligible for exemption.

⁴⁰⁰ See *supra* notes 165–168 and accompanying text.

⁴⁰¹ 139 S. Ct. at 2363–64.

⁴⁰² See *supra* notes 99, 171 and accompanying text.

⁴⁰³ See *supra* note 172 and accompanying text.

That said, several judicial decisions suggest that screening for third-party CBI is unnecessary. As noted earlier, courts have held that *Food Marketing Institute*'s first prong, requiring that the information be customarily and actually kept private, applies only to information originating from the CBI holder itself.⁴⁰⁴ In addition, courts have held that the systems of records protected by the Privacy Act do not apply to information about a third party contained in a record about another party.⁴⁰⁵ Finally, the survey conducted by the research team suggests that rulemaking comments rarely contain CBI belonging to third parties.⁴⁰⁶

Agencies thus bear little burden to screen comments for CBI when the submitter has not requested confidential treatment regardless of whether the comment includes first-party or third-party CBI. When commenters do affirmatively request confidential treatment of some material, agencies should process those requests in accordance with their established policies.

G. The Need to Screen All Docket Materials for Certain Types of PII, Possibly Through Computerized Screening

Unlike CBI, the legal analysis suggests that agencies may have a higher obligation to screen public rulemaking dockets for PII. This report addresses separately the issues presented by PII associated with the party submitting the comment (called for purposes of this report “first-person PII”) and the issues presented by PII associated with parties other than one submitting the comment (called for purposes of this report “third-person PII”).

Regarding first-person PII, legal precedent and government policy support broad disclosure. Federal law endorses a broad presumption in favor of disclosure, and the interest in

⁴⁰⁴ See *supra* note 169 and accompanying text.

⁴⁰⁵ See *supra* notes 125–126 and accompanying text.

⁴⁰⁶ See *supra* Table 5.

disclosure is particularly strong in the context of rulemaking.⁴⁰⁷ In addition, certain PII can be important for the public to understand the relevance of particular comments.⁴⁰⁸ Finally, commenters' privacy interests are particularly weak (and may have been waived altogether) when they have foregone available opportunities for confidential submission.⁴⁰⁹

But other considerations favor offering protection for PII in public rulemaking dockets in certain contexts. Courts balancing the public's interest in disclosure against individuals' interest in privacy found the latter particularly strong when disclosure would significantly increase the risk of identity theft or some other similar harm.⁴¹⁰ In addition, the judicial rules implementing the E-Government Act of 2002 require courts to protect certain types of information, including social security numbers, taxpayer-identification numbers, birthdates, names of individuals known to be minors, and financial account numbers.⁴¹¹ FOIA cases have similarly blocked disclosure of Social Security numbers, places of birth, dates of birth, dates of marriage, and employment histories, though not explicitly in the rulemaking context.⁴¹² Disclosure of these types of information would provide so little benefit to the public rulemaking process so as to render the risks of invasion of personal privacy unjustified, and thus these specific categories of information likely could be withheld, though the waiver submission indicates withholding is not *required*. Judicial precedent under the E-Government Act reflects reluctance to expand beyond these categories.⁴¹³

⁴⁰⁷ See *supra* notes 156–158, 182–185, 388–390 and accompanying text.

⁴⁰⁸ See *supra* notes 184–186 and accompanying text.

⁴⁰⁹ See *supra* notes 187–189 and accompanying text.

⁴¹⁰ See *supra* note 191 and accompanying text.

⁴¹¹ *supra* notes 72, 149–150 and accompanying text.

⁴¹² See *supra* notes 199–200 and accompanying text.

⁴¹³ See *supra* note 151 and accompanying text.

The obligations to screen for third-party PII are even stronger. Although information about third-parties falls outside the definition of system of records under the Privacy Act,⁴¹⁴ it can be protected against disclosure by FOIA Exemption 6 if the statutory criteria are met.⁴¹⁵ Any inferences of waiver from failure to request confidential treatment are clearly improper for third-party PII.⁴¹⁶ In addition, the survey conducted by the research team suggests that comments containing third-party PII represent a much more significant concern than comments containing third-party CBI.⁴¹⁷

These sources suggest that agencies may bear some obligation to screen all comments for certain types of PII. Fortunately, these types of PII represent the type of repetitive pattern that is particularly amenable to computer-based screening. Computer-based screening that identifies the specific types of PII enumerated above and redacts that information (or flags it for manual review) could significantly reduce the burden on agencies while still protecting the privacy of commenters who mistakenly submit PII.

H. The Benefits of Providing Guidance and Training to Agency Staff About Standards for Determining What Materials Merit Withholding

The research into the substantive standards used to screen material submitted to public rulemaking dockets revealed that only some agencies screen and that few have set standards when determining what to redact. Some, but not all, agencies reported giving personnel responsible for screening guidance regarding how to screen, and that guidance varied widely in

⁴¹⁴ See *supra* notes 125–126, 405 and accompanying text.

⁴¹⁵ See *supra* note 104, 108–112 and accompanying text. Note again that while it is not clear whether the FOIA *requires* withholding of third-party PII, it is likely that such information could be disclosed if the agency felt that it would contribute to public understanding of its actions and doing so would not constitute “a clearly unwarranted invasion of personal privacy.” See *supra* Part I.C.6.b.

⁴¹⁶ See *supra* note 190 and accompanying text.

⁴¹⁷ See *supra* Tables 5, 7.

its level of specificity. Only 2 agencies reported requiring formal training of screening staff. Some interview participants expressed concern that individual staff would base decisions on their own conceptions of what is protectable.⁴¹⁸

The adoption and distribution of clear standards for what constitutes protectable material would appear to offer significant benefits in terms of promoting outcomes that are uniform and consistent with the rule of law. As noted earlier, judicial decisions interpreting FOIA Exemptions 4 and 6 provide the best guides for substantive standards, although the E-Government Act of 2002 provides important insights for PII as well. The standards for CBI should largely follow the Supreme Court's recent decision in *Food Marketing Institute v. Argus Leader Media*.⁴¹⁹ The standards for PII should follow the list enumerated in the Section III.G.

Because of the inherent balancing involved in every FOIA decision, there are not clear, universally recognized standards readily available for agencies to adopt. However, as explored in the preceding section and as suggested by the categories of information protected by the rules governing judicial disclosure issued under the E-Government Act of 2002,⁴²⁰ agencies should particularly consider including the following types of PII in their screening guidance:

- Birth dates (leaving birth year disclosed).
- Financial account numbers submitted by individuals.
- The first five digits of Social Security numbers.
- Places of birth.
- Tax-payer identification numbers.
- Specific street address (leaving zip code disclosed).

Agencies should also consider requiring periodic privacy training for all agency personnel and specialized training for screening personnel.

⁴¹⁸ See *supra* Part II.C.2.

⁴¹⁹ 139 S. Ct. 2356, 2363–64 (2019).

⁴²⁰ See *supra* notes 72, 149–150 and accompanying text.

I. The Benefits of Providing Clear Internal and External Guidance on Agency Procedures for Decisions Regarding Protected Materials

In addition to providing guidance to commenters regarding processes for asserting claims of confidentiality, good administrative practice suggests that agencies should develop and publicize their procedures for handling such claims.

As noted earlier, one agency confers the power to determine the protectability of claimed material upon the General Counsel or her designee.⁴²¹ Another agency assigns responsibility for initial determinations to its Assistant Secretary for FOIA, Privacy and Sunshine Acts Compliance and allows appeals of initial determinations to the General Counsel.⁴²² Other agencies rely on Ombudsmen to help resolve complaints about disclosure.

To date, challenges to agency decisions regarding confidentiality appear to be rare.⁴²³ Such processes are likely become more important should the pattern of seeking confidentiality continue to increase in frequency, as one interview subject observed. Because challenges to agency determinations regarding comments are rare, it is unclear which option explored above regarding challenges is best. However, the research team recommends that each agency's website and NPRM designate at least one contact person for commenters to consult regarding possible grievances with respect to withholding or disclosure.

J. The Proper Use of Redaction, Aggregation, and Anonymization Over Full Withholding

As mentioned above, circumstances exist where withholding of certain information is necessary. In those situations, agencies should consider adopting methods of redaction,

⁴²¹ See *supra* notes 380–381 and accompanying text.

⁴²² See *supra* notes 382–386 and accompanying text.

⁴²³ See *supra* Table 13.

aggregation, and anonymization that allow the public to review *some* of the information submitted instead of fully withholding a document or comment from the administrative docket or other types of public disclosure.

For example, when PII submitted is submitted in comments, generally only that PII (addresses, birth dates, Social Security numbers, etc.) need be redacted—all other information can be disclosed with those particulars blacked out. CBI can similarly be protected via redaction, especially if agencies require those submitting CBI to submit their own redacted copy. Redaction is the simplest solution for documents and comments where there are scattered instances of CBI or PPI. And the government’s broad disclosure policy is supported by limited redaction, as oppose to withholding. Redaction allows other commentors and those following the rulemaking process to fully understand the arguments being put forth without risking any personal information.

Anonymization can also be used as a tool to protect a submitter’s identity, especially when it involves personal stories of medical history or employment. The best way to allow commenters to take advantage of anonymization as a tool is to enable submitters to comment anonymously. That way, an agency does not have the name of the individual at any time and cannot disclose it in any circumstances. When using anonymization, however, agencies should keep in mind that FOIA’s definition of an unwarranted invasion of privacy includes even those situations where names are redacted, but a person with additional knowledge could nonetheless identify the individual.⁴²⁴

When an agency is confronted with a large amount of confidential information from a number of businesses, agencies should use both aggregation and anonymization to disclose that

⁴²⁴ See *supra* notes 180–84 and accompanying text.

data. For example, agencies can disclose CBI that includes sensitive numerical data tied to a sufficiently large number of businesses if all identifying information is removed. However, agencies must make sure that any individual businesses are not readily identifiable from the information they disclose. If there is one key statistic that could identify a business, aggregation would not offer sufficient protection.

IV. CONCLUSION

Many agencies are now in the midst of a significant increase of public comments as online commenting portals allow for increased participation across the country. By adopting some or all of the methods mentioned above, agencies can strike the proper balance between honoring their statutory obligations towards openness while still taking care to protect personal and business information privacy. In particular, a focus on providing multiple levels of notice to submitters will allow commenters to make informed decision about the information they want to disclose, while relieving some of the pressure of the agencies to proactively screen thousands of comments.

APPENDICES

Appendix A: Text of the Survey Sent to Agencies

2019 Survey on Protected Materials in Public Rulemaking Dockets

Welcome to the 2019 Survey on Protected Materials in Public Rulemaking Dockets. This survey is part of a project for the Administrative Conference of the United States (ACUS) that is exploring how agencies can achieve the proper level of disclosure while protecting sensitive materials in their public rulemaking dockets. For more information about the project, please visit the ACUS website here: <https://www.acus.gov/research-projects/protected-materials-public-rulemaking-dockets>.

Purpose of the Survey: This survey aims to learn about agency practices involving the protection of confidential business information, such as trade secrets and financial regulatory information, and personally identifiable information, including medical information, in public rulemaking dockets. It will help inform generalized recommendations about how agencies can best balance transparency and the protection of sensitive materials within their public rulemaking dockets.

Study Procedures: This survey should take 15 to 30 minutes to complete. The ideal respondent is an agency official with firsthand knowledge of the agency's procedures and practices on screening comments and identifying confidential business information, such as trade secrets and financial regulatory information, and personally identifiable information, including medical information, within such comments or within any other part of the rulemaking docket. All answers are voluntary. We would be very grateful if you could complete the survey by January 10, 2020.

Confidentiality of Responses: This project report for ACUS will identify the names of the agencies participating in the survey and use survey responses to provide aggregated information about agency practices. For example, the report will summarize recommended best practices, but will not attribute specific responses to particular agencies without explicit permission.

Who to Contact with Questions:

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Identifying Information

What is the name of your agency?

What is your position at the agency (including the office in which you work)?

Protected Materials

Which of the following types of confidential business information (CBI) does your agency encounter during its rulemaking proceedings, either in public comments or otherwise? (Check all that apply.)

- Trade Secrets
- Financial Regulatory Information (e.g. Form 8-K, Form 10-K)
- Other kinds of CBI (please specify)

Of the types of CBI that your agency receives through public comments, how often is the information submitted about a third party, rather than about the submitter?

Never	Half the time						Every time CBI is submitted			
0	1	2	3	4	5	6	7	8	9	10
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>							

Which of the following types of personally identifiable information (PII) does your agency encounter during its rulemaking proceedings, either in public comments or otherwise? (Check all that apply.)

- Social Security numbers
- Medical information
- Other kinds of PII (please specify)

Of the types of PII that your agency receives through public comments, how often is the information submitted about a third party, rather than about the submitter?

Never	Half the time						Every time PII is submitted			
0	1	2	3	4	5	6	7	8	9	10
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>							

Does your agency provide advance guidance to the public regarding its policies on the submission of CBI and PII in the following types of proceedings? If so, how is that guidance provided? (Check all that apply.)

- Public comments in response to an Advance Notice of Proposed Rulemaking or Notice of Proposed Rulemaking
- Statements made at public meetings
- Information submitted during a negotiated rulemaking
- Survey responses
- Ex parte communications
- Other (please specify)

Does your agency screen information received during its rulemaking proceeding for CBI and PII?

- Yes
- No

If so, who screens for CBI and PII? (Check all that apply.)*

- Agency employees
- Independent contractor
- Artificial Intelligence
- Other (please specify)

What guidelines are given to the screeners to identify CBI and PII?

On a scale of 0-10, how often does your agency exclude from its public rulemaking docket CBI or PII submitted by the public?

Never					Half the time					In every proceeding
0	1	2	3	4	5	6	7	8	9	10
<input type="radio"/>										

Does your agency have a review process for challenging decisions regarding the disclosure or withholding of CBI or PII from its public rulemaking docket? If so, please provide details of that process. (Check all that apply.)

- Process for challenging decisions regarding disclosure
- Process for challenging decisions regarding withholding

On a scale of 0-10, how often are challenges regarding disclosure brought?

Never					Half the time					In every proceeding
0	1	2	3	4	5	6	7	8	9	10
<input type="radio"/>										

On a scale of 0-10, how often are challenges regarding withholding brought?

Never					Half the time					In every proceeding
0	1	2	3	4	5	6	7	8	9	10
<input type="radio"/>										

What techniques, if any, does your agency use to facilitate meaningful public comment regarding CBI and PII that has been withheld? (Please check all that apply.)

- Aggregation
- Redaction

* The version of this question that appeared on the survey was misstated. The research team contacted all survey respondents by email requesting a response to the corrected question. The answers to the corrected questions are reflected in this report.

- Anonymization
- Other (please specify)

If there is anything further you would like us to know or consider, please let us know here.

Closing Questions

Please provide your name and contact information for survey validity.

Would you be willing to speak with us in more detail, either on or off the record?

- Yes
- No

Are you willing to have your responses tied to your agency in the report? The report will include which agencies participated in this survey, but specific responses will not be connected to any agency without permission.

- Yes
- No

Appendix B: Comparison of NPRM Language on the Disclosure and Withholding of Protected Materials in Rulemaking Dockets

Agency	Notice of Public Disclosure	Explicit Guidance Not to Disclose PII*	Explicit Guidance Not to Disclose CBI	Process for Confidential Submission	Citation
Commodity Futures Trading Commission	Yes	No	No	No	84 Fed. Reg. 21,044 (May 13, 2019).
Centers for Medicare and Medicaid Services	Yes	No	No	No	85 Fed. Reg. 7,501 (Feb. 10, 2020).
Consumer Financial Protection Bureau	Yes	Yes	No	No	84 Fed. Reg. 67,132 (Dec. 6, 2019).
Federal Communications Commission	No	No	No	No	85 Fed. Reg. 6,841 (Feb. 6, 2020).
Federal Election Commission	Yes	Yes	Yes	No	83 Fed. Reg. 12,864 (Mar. 26, 2018).
Federal Energy Regulatory Commission	Yes	No	No	No	85 Fed. Reg. 6,831 (Feb. 6, 2020).
Federal Housing Finance Agency	Yes	No	No	No	84 Fed. Reg. 68,350 (Dec. 16, 2019).
Federal Mine Safety and Health Review Commission	No	No	No	No	75 Fed. Reg. 28,223 (May 20, 2010).
Federal Trade Commission	Yes	Yes	Yes	Yes	84 Fed. Reg. 58,348 (Oct. 31, 2019).
Internal Revenue Service	Yes	No	No	No	85 Fed. Reg. 2,061 (Jan. 14, 2020).
National Archives and Records Administration	No	No	No	No	83 Fed. Reg. 45,587 (Sept. 10, 2018)
National Labor Relations Board	Yes	Yes	No	No	84 Fed. Reg. 4,9691 (Sept. 23, 2019).
Occupational Safety and Health Administration	Yes	Yes	No	No	84 Fed. Reg. 53,902 (Oct. 8, 2019).

* While many agencies mention that public information will be posted, this category is limited to agencies that explicitly discourage users from including personally identifiable information in the body of their comments.

Agency	Notice of Public Disclosure	Explicit Guidance Not to Disclose PII*	Explicit Guidance Not to Disclose CBI	Process for Confidential Submission	Citation
Occupational Safety and Health Review Commission	No	No	No	No	83 Fed. Reg. 48,578 (Sept. 26, 2018).
Office of Management and Budget	Yes	Yes	Yes	No	83 Fed. Reg. 42,610 (Aug. 23, 2018).
Office of the Comptroller of the Currency	Yes	Yes	Yes	No	85 Fed. Reg. 1,052 (Jan. 8, 2020).
Postal Regulatory Commission	No	No	No	No	84 Fed. Reg. 53,840 (Oct. 8, 2019).
Surface Transportation Board	Yes	No	No	No	84 Fed. Reg. 65,768 (Nov. 29, 2019).
U.S. Department of Agriculture	Yes	Yes	Yes	Yes	85 Fed. Reg. 2,897 (Jan. 17, 2020).
U.S. Department of Commerce (NIST)	Yes	Yes	Yes	No	85 Fed. Reg. 7,258 (Feb. 7, 2020).
U.S. Department of Defense	Yes	No	No	No	83 Fed. Reg. 46,542 (Sept. 13, 2018).
U.S. Department of Education	Yes	No	No	No	84 Fed. Reg. 67,778 (Dec. 11, 2019).
U.S. Department of Energy	Yes	Yes	Yes	Yes	84 Fed. Reg. 62,481 (Nov. 15, 2019).
U.S. Department of Homeland Security	Yes	No	No	No	84 Fed. Reg. 30,634 (June 27, 2019).
U.S. Department of Justice	Yes	Yes	Yes	Yes	85 Fed. Reg. 5,356 (Jan. 30, 2020).
U.S. Department of Labor	Yes	No	No	No	84 Fed. Reg. 53,956 (Oct. 8, 2019).
U.S. Department of State	Yes	Yes	No	Yes	83 Fed. Reg. 24,198 (May 24, 2018).
U.S. Department of the Treasury	Yes	No	No	No	82 Fed. Reg. 67 (Jan. 3, 2017).
U.S. Department of Transportation	Yes	No	No	No	84 Fed. Reg. 52,706 (Oct. 2, 2019).

Agency	Notice of Public Disclosure	Explicit Guidance Not to Disclose PII*	Explicit Guidance Not to Disclose CBI	Process for Confidential Submission	Citation
U.S. Department of Veterans Affairs	Yes	No	No	No	84 Fed. Reg. 13,576 (Apr. 5, 2019).
U.S. Environmental Protection Agency	Yes	No	Yes	Yes	85 Fed. Reg. 7,480 (Feb 10, 2020).
U.S. Equal Employment Opportunity Commission	Yes	Yes	No	No	84 Fed. Reg. 5,624 (Feb. 22, 2019).
U.S. Food and Drug Administration	Yes	Yes	Yes	Yes	84 Fed. Reg. 12,740 (Apr. 2, 2019).
U.S. General Services Administration	Yes	No	No	No	83 Fed. Reg. 55,838 (Nov. 8, 2018).
U.S. International Trade Commission	Yes	No	No	No	82 Fed. Reg. 44,982 (Sept. 27, 2017).
U.S. Merit Systems Protection Board	Yes	Yes	Yes	Yes	79 Fed. Reg. 18,658 (Apr. 3, 2014).
U.S. Nuclear Regulatory Commission	Yes	Yes	No	No	85 Fed. Reg. 1,129 (Jan. 9, 2020).
U.S. Office of Government Ethics	Yes	Yes	No	No	85 Fed. Reg. 7,252 (Feb. 7, 2020).
U.S. Office of Personnel Management	Yes	No	No	No	48 Fed. Reg. 72,250 (Dec. 31, 2019).
U.S. Securities and Exchange Commission	Yes	Yes	No	No	84 Fed. Reg. 44,358 (Aug. 23, 2019).
U.S. Small Business Association	Yes	No	No	Yes	84 Fed. Reg. 29,399 (June 24, 2019).
U.S. Social Security Administration	Yes	Yes	No	No	84 Fed. Reg. 65,040 (Nov. 26, 2019).

Appendix C: Comparison of Language on the Disclosure and Withholding of Protected Materials in SORNs Regarding Rulemaking Dockets

Agency	System Name	Mentions Public Disclosure of Comments	Mentions Possible Redaction	Citation
Commodity Futures Trading Commission	CFTC-45	Yes	Yes	84 Fed. Reg. 17,816 (Apr. 26, 2019).
Federal Communications Commission	FCC/CGB-2; Comment Filing System (ECFS)	Yes	No*	71 Fed. Reg. 17,234 (April. 5, 2006).
Federal Trade Commission	FTC-I-6	Yes	No	73 Fed. Reg. 33,592 (June 12, 2008).
U.S. Department of Defense	DoD Federal Docket Management System (DoDFDMS)	Yes	No	71 Fed. Reg. 586 (Jan. 5, 2006).
U.S. Department of Justice	Justice Federal Docket Management System [Justice FDMS], DOJ-013	Yes	Yes	72 Fed. Reg. 12,196 (Mar. 15, 2007).
U.S. Department of Labor	Department of Labor Federal Docket Management System (DOLFDMS), DOL/CENTRAL-8.	Yes	No	84 Fed. Reg. 57,484 (Oct. 25, 2019).
U.S. Department of the Treasury	Department of the Treasury—.018 ERulemaking System of Records	Yes	Yes	85 Fed. Reg. 1,198 (Jan. 9, 2020).
U.S. Department of Transportation	DOT/ALL 14: Federal Docket Management System	Yes	No	73 Fed. Reg. 3,316 (Jan. 17, 2008).
U.S. Department of Veterans Affairs	Department of Veterans Affairs Federal Docket Management System Commenter Information (VAFDMS)	Yes	No	82 Fed. Reg. 35,872 (Aug. 1, 2017).
U.S. Environmental Protection Agency	Federal Docket Management System (FDMS)	Yes	Yes	70 Fed. Reg. 15,086 (Mar. 24, 2005).

* Mentions policies for confidential submission, but no other affirmative redaction.

Appendix D: Model NPRM Language Disclosure and Withholding of Protected Materials in Rulemaking Dockets

All comments received are considered part of the public record and made available for public inspection online at [Regulations.gov]. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) or any other information voluntarily submitted by the commenter. Once submitted, comments cannot be edited or removed from [Regulations.gov]. [Agency] may publish any comment received to its public docket.

Those submitting comments **should not** include any information, including Social Security numbers, birthdates, financial information, contact information, medical information, or other similar information that they do not want to be publicly viewable. You are solely responsible for making sure that your comment does not include any sensitive personal information. Submission of personally identifiable information into the rulemaking docket constitutes a waiver of any claims of confidentiality. **[OPTIONAL LANGUAGE FOR AGENCIES THAT WANT TO ACCEPT PII: If you wish to submit personally identifiable information, see the section on Personally Identifiable Information.]**

Those submitting comments **should not** include any information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (“CBI”). You are solely responsible for making sure that your comment does not include any confidential business information. Submission of confidential business information into the rulemaking docket without a request for protected treatment constitutes a waiver of any claims of confidentiality. **[OPTIONAL LANGUAGE FOR AGENCIES THAT WANT TO ACCEPT CBI: For information on requesting protected treatment of CBI, see the section on Confidential Business Information.]**

The agency reserves the right to redact any submissions in part or in full when making comments available to the public. If you have questions about any decisions to disclose or withhold any information or if you have questions about your publicly viewable comment, please contact [docket staff/agency counsel/other contact person.]

Potential Additional Language for Agencies That Want to Receive PII

Personally Identifiable Information

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Your comment will be kept confidential only if agency staff grants your request in accordance with the law and the public interest. Personal identifying information identified and located as set forth above and approved by agency staff will be placed in the agency’s public docket file, but not posted online.

Potential Additional Language for Agencies That Want to Receive CBI

Option 1

Confidential Business Information

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. Your comment will be kept confidential only if agency staff grants your request in accordance with the law and the public interest. The agency has the discretion to post that comment as redacted, make revisions to the request for redaction, not to post comments that contain so much confidential business information that they cannot be redacted effectively, or to reject claims of confidentiality. Confidential business information identified and located as set forth above and approved by agency staff will not be placed in the public docket file, nor will it be posted online.

Option 2

Confidential Business Information

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must submit your comments [“only as a written or paper submission” or “through [Regulations.gov]”]. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted or blacked out, will be available for public viewing online. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Your comment will be kept confidential only if agency staff grants your request in accordance with the law and the public interest. The agency has the discretion to post that comment as redacted, to make revisions to the request for redaction, not to post comments that contain so much confidential business information that they cannot be redacted effectively, or to reject claims of confidentiality. Confidential business information identified and located as set forth above and approved by agency staff will not be placed in the public docket file, nor will it be posted online.

Appendix E: Model Website Language on the Disclosure and Withholding of Protected Materials in Rulemaking Dockets

The model language is based on the primary disclosure appearing at the bottom of the comment submission page on Regulations.gov. Additional text is marked in bold.

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. **Do not submit information whose disclosure is restricted by statute**, such as trade secrets or commercial and financial information, via [the online commenting platform]. **Do not submit sensitive personal information**, such as social security numbers or banking information, **or confidential business information, such as trade secrets**, via [the online commenting platform]. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the [link to detailed information about submitting paper or email comments], the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.