



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records  
FROM: Jeremy Graboyes  
DATE: December 27, 2019  
RE: Components of and Exclusions from Rulemaking Records

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This Memorandum provides briefing materials in advance of the January 15, 2020, meeting of the Working Group on Compiling Administrative Records. It covers issues related to what materials personnel should add or need not add to rulemaking records during the course of informal rulemaking proceedings.

As defined in Administrative Conference of the United States (ACUS) Recommendation 2013-4,<sup>1</sup> the rulemaking records are internal agency records distinct from external-facing public rulemaking dockets and administrative records for judicial review.<sup>2</sup> The Working Group will consider the necessary components of and appropriate exclusions from public rulemaking dockets and administrative records for judicial review in a subsequent meeting.

The information in this Memorandum is based primarily on Recommendation 2013-4, Leland Beck's 2013 consultant report to ACUS,<sup>3</sup> and rules and guidance materials previously developed by the following agencies:

- Department of the Interior (DOI);<sup>4</sup>
- Environmental Protection Agency (EPA);<sup>5</sup>
- Food and Drug Administration (FDA);<sup>6</sup>
- Internal Revenue Service (IRS);<sup>7</sup> and
- National Oceanic and Atmospheric Administration (NOAA).<sup>8</sup>

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013), <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>.

<sup>2</sup> *Id.*

<sup>3</sup> Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* (May 14, 2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report>.

<sup>4</sup> Dep't of the Interior, *Standardized Guidance on Compiling a Decision File and an Administrative Record* (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf> [hereinafter DOI Guidance].

<sup>5</sup> ENVTL. PROTECTION AGENCY, *ADMINISTRATIVE RECORDS GUIDANCE* (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance].

<sup>6</sup> 21 C.F.R. § 10.40(g).

<sup>7</sup> INTERNAL REVENUE MANUAL pt. 32, <https://www.irs.gov/irm/part32> (last visited Sep. 27, 2019) [hereinafter IRS Guidance].

<sup>8</sup> Nat'l Oceanic & Atmospheric Admin., *Guidelines for Compiling an Agency Administrative Record* (Dec. 21, 2012), [https://www.gc.noaa.gov/documents/2012/AR\\_Guidelines\\_122112-Final.pdf](https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf) [hereinafter NOAA Guidance].

Many of the relevant principles in these guidance documents appear to originate in guidance issued by the Department of Justice in 1999<sup>9</sup> and subsequently republished in the *U.S. Attorneys' Bulletin*.<sup>10</sup>

This information is provided for background purposes only. It does not necessarily represent the views of ACUS or of the Working Group.

## **BACKGROUND**

In Recommendation 2013-4, ACUS recommended that agencies that engage in informal rulemaking should issue publicly available guidance to aid personnel in implementing the best practices set forth in that Recommendation.<sup>11</sup> Among those best practices, ACUS recommended that agency personnel “begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking” and “continue compiling the rulemaking record as long as the rule is pending before the agency.”<sup>12</sup>

In its first meeting, the Working Group discussed how agencies should explain to personnel *when* to compile rulemaking records.<sup>13</sup> In its second meeting, the Working Group will discuss *what* materials personnel should and need not add to rulemaking records.<sup>14</sup>

Recommendation 2013-4 urges agencies, in the absence of any specific statutory requirement to the contrary, to include in rulemaking records all materials “considered by the agency during the course of the rulemaking.”<sup>15</sup> Recommendation 2013-4 also implies that personnel should manage rulemaking records in such a way that they include all or nearly all materials that agency personnel may need to compile public rulemaking dockets and administrative records for judicial review.<sup>16</sup> As DOI Guidance explains, the creation of a complete rulemaking record during the rulemaking process results in a “single organized source of information that records the agency decision and decision-making process” and enables personnel to efficiently and accurately compile complete records for more specific purposes.<sup>17</sup>

For several reasons, agencies may find it challenging to develop plain-language guidelines that personnel—with varying levels of experience and who may not be attorneys or career officials—can understand and quickly, easily, and consistently apply to specific materials. First, as ACUS has acknowledged, what it means for “the agency” to have “considered”

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<sup>9</sup> U.S. Dep’t of Justice, Env’t. & Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record (1999), [https://environment.transportation.org/pdf/programs/usdoj\\_guidance\\_re\\_admin\\_record\\_prep.pdf](https://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf).

<sup>10</sup> See Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. ATTY. BULL. 7 (Feb. 2000), <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf>.

<sup>11</sup> Recommendation 2013-4, *supra* note 1, ¶ 11.

<sup>12</sup> *Id.*, ¶ 4.

<sup>13</sup> October 29, 2019 Meeting of the Working Group on Compiling Administrative Records, Admin. Conf. of the U.S., <https://www.acus.gov/meetings-and-events/event/october-29-2019-meeting-working-group-compiling-administrative-records> (last visited Nov. 20, 2019).

<sup>14</sup> The Working Group will discuss *how* personnel should add materials to rulemaking records in a subsequent meeting.

<sup>15</sup> Recommendation 2013-4, *supra* note 1, ¶ 1.

<sup>16</sup> *Id.*, ¶¶ 2-3.

<sup>17</sup> DOI Guidance, *supra* note 4, at 2, 4.

materials during the course of a rulemaking “resists precise definition.”<sup>18</sup> Second, even reasonable minds that agree on the meaning of this standard can reach widely varying conclusions applying it to specific materials.<sup>19</sup> Third, the standard—what materials will the final decision maker have considered in making an as-yet unfinalized decision?—may require some degree of prognostication.

Existing agency guidance documents employ at least four tactics to provide clear guidance to personnel despite these challenges:

- Explain how personnel rely on rulemaking records, to encourage personnel to add materials to rulemaking records to best satisfy those needs.
- Provide a general standard that explains what materials personnel should add to rulemaking records, i.e., those materials “considered” by “the agency.”
- Provide guidance on specific categories of materials that agency personnel are likely to encounter during an informal rulemaking process.
- Advise personnel to err on the side of adding any materials that are potentially relevant and significant to rulemaking records to avoid incomplete rulemaking records, and encourage personnel to consult with attorneys as necessary.

The following sections address each of these approaches in turn. The Working Group may wish to consider including some or all of them in its final product.

### **EXPLAINING THE PURPOSES OF RULEMAKING RECORDS**

There are several potential recordkeeping obligations associated with informal rulemaking proceedings:

- An agency must maintain a public rulemaking docket to provide a meaningful opportunity for public notice and comment.
- If an individual challenges a final rule, an agency may need to assemble an administrative record (AR) for judicial review that demonstrates a rational basis for the rule’s substance.
- The agency may need to assemble an AR for judicial review that demonstrates it considered all matters required by law and the record as whole, including contrary evidence and viewpoints.

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<sup>18</sup> Recommendation 2013-4, *supra* note 1, ¶ 1.

<sup>19</sup> See Beck, *supra* note 3, at 32 (“failure to define terms such as ‘relevance’ precisely in guidance may lead to varied, and perhaps unintended, interpretations by individuals involved in compiling rulemaking records that may lead to further unintended consequences in administrative records”).

- The agency may need to assemble an AR for judicial review that documents its compliance with the procedural requirements for informal rulemaking proceedings.
- The agency may need to comply with other recordkeeping requirements not specific to informal rulemaking proceedings, such as those set forth in the Federal Records Act and other federal laws and policies.<sup>20</sup>
- An official responsible for approving a final rule may require access to a file containing sufficient information to enable her to reach an informed decision.

The creation of a general rulemaking record by agency personnel throughout the rulemaking process results in a “single organized source of information that records the agency decision and decision-making process.”<sup>21</sup> This enables personnel to efficiently and accurately compile complete records for the other, more specific purposes listed above.<sup>22</sup>

Existing agency guidance documents describe some or all of the potential recordkeeping obligations described above and emphasize the importance of managing rulemaking records during an informal rulemaking proceeding so the agency can satisfy more specific recordkeeping obligations when necessary. For example, DOI Guidance explains:

Under the Administrative Procedure Act (“APA”), a court reviews an agency’s action (*e.g.*, any decision) to determine if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In making this determination, a court evaluates the agency’s complete AR. Consequently, the agency must take great care in compiling a complete AR. Courts will generally defer to agency decisions, although the degree of deference often varies. For example, if the Department made a thorough and informed decision, but documentation supporting the decision is not contained in the AR, any deference a court may have given to the agency decision could be lost or diminished. . . .

[I]t is important that all Bureaus and Offices maintain organized, accurate, and thorough Decision Files that document work on their decisions. A complete Decision File ensures that the decision-maker, typically the individual signing the decision document, has access to information sufficient to render a well-reasoned decision. An agency must also protect the public’s interest in government documents, and preserve its own interests, including compliance with the Federal Records Act and related requirements. Finally, if an agency decision is challenged in court, a thorough Decision File will enable the agency to compile an AR sufficient to defend a decision. . . .

The Decision File, and any subsequent AR presented to the court, should:

- Contain the complete “story” of the agency decision-making process, including options considered and rejected by the agency;
- Include important substantive information that was presented to, relied on, or reasonably available to the decision-maker;
- Establish that the agency complied with relevant statutory, regulatory, and agency requirements; and

<sup>20</sup> Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 9–10 (2018).

<sup>21</sup> See DOI Guidance, *supra* note 4, at 4.

<sup>22</sup> See Recommendation 2013-4, *supra* note 1, ¶ 4.

- Demonstrate that the agency followed a reasoned decision-making process.<sup>23</sup>

EPA and NOAA Guidance contain similar explanations, though they focus more narrowly on the need for a complete administrative record for judicial review.<sup>24</sup>

Guidance documents may also describe how incomplete rulemaking records can impose administrative burdens or result in undesirable legal outcomes. For example, EPA Guidance explains:

There can be significant costs to the Agency in compiling an inadequate record. An incomplete record may mean that the Agency action is overturned by a reviewing court or remanded for additional explanation. That in turn can require additional staff time and resources. In addition, some courts faced with an inadequate record will allow supplementation of the record by the opposing parties or will allow discovery, which can be very time- and resource-intensive. Compilation of a complete administrative record will help the Agency avoid these adverse consequences in litigation.<sup>25</sup>

DOI Guidance explains that by maintaining a “contemporaneous record of the agency’s decision-making process,” personnel “increase efficiency and performance should it become necessary to create an AR.”<sup>26</sup>

### **GENERAL STATEMENTS ON RULEMAKING RECORD COMPONENTS**

Recommendation 2013-4 encouraged agencies to adopt policies that require personnel to add to the rulemaking record all materials “considered by the agency during the course of the rulemaking.”<sup>27</sup> The Recommendation defines “consideration” to entail “some minimum degree of attention to the contents of a document,” regardless of whether “the reviewer disagreed with the factual or other analysis in the document” or “the agency did not or will not rely on it.”<sup>28</sup> Consideration by “the agency” entails review by “an individual with substantive responsibilities in connection with the rulemaking.”<sup>29</sup> By way of illustration, the Recommendation explains:

Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking.<sup>30</sup>

Similarly, in a 1993 Recommendation, ACUS explained that although agencies should maintain an index of “all written factual materials, studies, or reports *substantially relied or seriously considered* by the agency in formulating its proposed and final rule,” this “need not encompass every study, report, or other document that the agency may have in its files or has

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<sup>23</sup> DOI Guidance, *supra* note 4, at 1–2.

<sup>24</sup> EPA Guidance, *supra* note 5, at 4–5; NOAA Guidance, *supra* note 8, at 2.

<sup>25</sup> EPA Guidance, *supra* note 5, at 4–5.

<sup>26</sup> DOI Guidance, *supra* note 4, at 2–3.

<sup>27</sup> The Working Group discussed “the course of the rulemaking” at its first meeting. *See supra* note 13.

<sup>28</sup> Recommendation 2013-4, *supra* note 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

otherwise used.”<sup>31</sup> Instead, personnel may only need to preserve any such materials “that exerted a significant impact on the agency’s thinking, even if they represent an approach that the agency ultimately did not accept.”<sup>32</sup>

The concepts of “consideration,” consideration of “contrary” materials, and consideration “by the agency” are complicated and potentially subject to uneven interpretation and application. Existing agency guidance documents tend to provide some explanation of (1) what constitutes “consideration,” (2) the need to include contrary materials that were “considered,” and (3) when consideration by personnel constitutes consideration by “the agency.”

## 1. “Considered”

DOI Guidance instructs personnel to add materials to a Decision File to sufficiently document: (a) “the complete ‘story’ of the agency decision-making process;” (b) “important substantive information that was presented to, relied on, or reasonably available to the decision-maker;” (c) compliance with “relevant statutory, regulatory, and agency requirements;” and (d) “a reasoned decision-making process.”<sup>33</sup> To that end, DOI personnel are instructed to add to rulemaking records all documents that are “relevant” to the final rule and “support” it. DOI Guidance explains that materials are relevant and supporting if they (a) “were available to the decision-maker at the time the decision was made;” (b) “bear a logical connection to the matter considered;” (c) “contain information related to the agency decision at issue;” (d) “were relied upon or considered by the agency;” and (e) “explain the agency decision-making process.”<sup>34</sup>

Although EPA Guidance focuses more narrowly on the administrative record for judicial review, it suggests personnel should at least manage rulemaking records to: (1) contain information that is “relevant to the decision and that was considered directly or indirectly by the decision-maker;” and (2) explain “why EPA’s action is reasonable and consistent with statutory and regulatory requirements.”<sup>35</sup>

NOAA Guidance, which similarly focuses on the administrative record for judicial review, instructs personnel that an administrative record for judicial review must:

- “[r]ationally explain the agency’s decisions,” i.e., “contain those documents necessary to show the complete history of the agency decision-making process;”
- “[i]nclude substantive factual information and data that is relevant to the full range of concerns at issue in the decision;” and

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<sup>31</sup> Admin. Conf. of the U.S., Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994).

<sup>32</sup> *Id.*

<sup>33</sup> DOI Guidance, *supra* note 4, at 2.

<sup>34</sup> DOI Guidance, *supra* note 4, at 4–6.

<sup>35</sup> EPA Guidance, *supra* note 5, at 5.

- “[d]emonstrate that the agency has followed the required procedures and met the legal standards and criteria found in applicable laws, regulations, and relevant agency policies.”<sup>36</sup>

To that end, NOAA Guidance instructs personnel to associate with a rulemaking record any “relevant” document—one that “relates (i.e., has a logical connection) to the action under consideration and informs, or has the potential to inform, the decision-maker.”<sup>37</sup>

## 2. Contrary Materials

Consistent with prevailing law,<sup>38</sup> each of the cited guidance documents above addresses the need for personnel to document facts, analyses, and opinions that are contrary to the agency’s proposed action.<sup>39</sup> DOI Guidance directs employees to document “options considered and rejected by the agency” and preserve materials considered by the agency “regardless of whether they support or oppose the agency’s position.” EPA Guidance directs personnel to document relevant information that “supports or is contrary to the action taken by EPA” and show “how EPA reviewed any contrary information and why EPA came to the decision that it did notwithstanding that information.” NOAA Guidance instructs personnel to include factual information “both in support of and contrary to the agency’s position” and to “[d]emonstrate consideration of opposing views of facts or data or alternative courses of action, if any, and provide a thorough explanation as to why the preferred course of action was adopted.”<sup>40</sup>

## 3. “By the Agency”

DOI Guidance, EPA Guidance, and NOAA Guidance explain what materials are said to have been considered by “the agency.” DOI Guidance instructs personnel to include “substantive documents . . . [t]hat were available to the decision-maker at the time the decision was made (i.e., considered by staff involved in the decision process as it proceeded through the agency), regardless of whether they were specifically reviewed by the decision maker.”<sup>41</sup> Consistent with

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<sup>36</sup> NOAA Guidance, *supra* note 8, at 6.

<sup>37</sup> *Id.* at 6–7.

<sup>38</sup> Daniel J. Rohlf, *Avoiding the ‘Bare Record’: Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N. UNIV. L. REV. 575, 584–85 (2009) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)); James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. REV. 1301, 1313 (2008) (same).

<sup>39</sup> *Accord* Goldfrank, *supra* note 10, at 8.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> DOI Guidance, *supra* note 4, at 5. Goldfrank explains that that the administrative record includes “[d]ocuments and materials which were available to the decision-making office at the time the decision was made” and “[d]ocuments and materials that were before the agency at the time of the challenged decision, even if the final agency decision-maker did not specifically consider them.” Goldfrank, *supra* note 10, at 8. Goldfrank explains further that agencies should include in an administrative record for judicial review “all documents and materials prepared, reviewed, or received by agency personnel and used by or available to the decision-maker, even though the final decision-maker did not review or know about the documents and materials.” *Id.*

prevailing law,<sup>42</sup> EPA and NOAA guidance instruct personnel to include all documents that the decision maker “directly” or “indirectly” considered.<sup>43</sup>

### **GUIDANCE ON SPECIFIC MATERIALS**

Besides encouraging agencies to ensure that rulemaking records include “materials considered by the agency during the course of the rulemaking,” Recommendation 2013-4 urges agencies to ensure that rulemaking records include at least the following specific materials:

- “notices pertaining to the rulemaking;”
- “comments and other materials submitted to the agency related to the rulemaking;”
- “transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;”
- “reports or recommendations of any relevant advisory committees;” and
- “other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking.”<sup>44</sup>

Similarly, DOI, EPA, NOAA, and IRS Guidance all contain guidance with respect to specific categories of materials that personnel are likely to encounter during an informal rulemaking proceeding.

The following sections reproduce existing agency guidance on whether personnel should include the following categories of materials in rulemaking records:

- Advisory Materials, Briefing Materials, and Options Papers
- Confidential Business Information (CBI)
- Consultant or Contractor Materials
- Data, Technical Information, and Technical Analyses
- Draft Materials and Intra-Agency Comments
- Electronic Communications (Email)
- Interagency Communications
- Internal Workflow Materials
- Legally Required Analyses and Transmittals
- Legal Materials and Agency Policies and Directives
- Meetings and Oral Communications (External)
- Meetings and Oral Communications (General)
- Memoranda to the File (General)
- Personal Notes
- Previous Rulemaking Materials

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<sup>42</sup> Rohlf, *supra* note 38, at 583–84 (2009) (citing *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); Saul, *supra* note 38, at 1313–14 (same).

<sup>43</sup> EPA Guidance, *supra* note 5, at 5; NOAA Guidance, *supra* note 8, at 6; *accord* Goldfrank, *supra* note 10, at 8 (“The administrative record consists of all documents and materials directly or indirectly considered by the agency decision-maker in making the challenged decision.”).

<sup>44</sup> Recommendation 2013-4, ¶ 1.

- Publications (Electronic)
- Publications (General)
- Public Comments
- Public Notices
- Publicly Released or Publicly Available Materials
- Referenced Materials
- State Government Communications

Given the purpose of rulemaking records under Recommendation 2013-4, I also include provisions about materials personnel should include in administrative records for judicial review.

### 1. Advisory Committee Materials<sup>45</sup>

Agency	Guidance
FDA	The “record of the administrative proceeding” includes any advisory committee materials submitted to the Division of Dockets Management. <sup>46</sup> The administrative record for judicial review may not include “the transcript of a closed portion of a public advisory committee meeting.” <sup>47</sup>

### 2. Advisory Materials, Briefing Materials, Option Papers, and Reports (Internal)

Agency	Guidance
EPA	EPA Guidance does not explain whether or not personnel should associate options papers with a rulemaking record during an informal rulemaking proceeding but instructs personnel to exclude “options papers” from the administrative record for judicial review. <sup>48</sup> EPA Guidance notes that while “[f]actual, scientific, and technical information is part of the record,” “staff advisory opinions or advice made as part of the decision-making process are not part of the record.” <sup>49</sup>
FDA	The “record of the administrative proceeding” includes “reports.” <sup>50</sup>
IRS	The legal file should contain “[b]riefing memoranda, briefing confirmation, and Conference Reports” and “policy memos.” <sup>51</sup>
NOAA	“Development of an agency action will also often produce internal briefing materials such as power-point presentations and briefing papers used to inform agency officials of issues regarding agency actions. . . . To the extent that internal communications contain factual or analytical information or directions from management not otherwise captured in the record, they should be included in the record and disclosed.” <sup>52</sup>

<sup>45</sup> Accord Recommendation 2013-4, *supra* note 1, ¶ 1(d).

<sup>46</sup> 21 C.F.R. § 10.40(g)(7).

<sup>47</sup> *Id.* § 10.40(g)(6).

<sup>48</sup> EPA Guidance, *supra* note 5, at 9.

<sup>49</sup> *Id.*

<sup>50</sup> 21 C.F.R. § 10.40(g)(6).

<sup>51</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>52</sup> NOAA Guidance, *supra* note 8, at 11.

### 3. Confidential Business Information (CBI)

Agency	Guidance
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . Confidential business information (CBI). The administrative record should include CBI if that information was considered during the decision-making process.” <sup>53</sup>

### 4. Consultant or Contractor Materials

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [r]eports and other information compiled by consultants and contractors.” <sup>54</sup> “If a consultant or contractor received or compiled public or agency comments, those comments and any reports or summaries should also be included in the AR.” <sup>55</sup>

### 5. Data, Technical Information, and Technical Analysis

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [t]echnical information, monitoring data, sampling results, survey information, engineering reports or studies, and other factual information or data.” <sup>56</sup>
EPA	“The administrative record should . . . include . . . technical analysis, and other factual information considered by the decision-maker, including his/her staff, in developing the Agency’s final position.” <sup>57</sup> “Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA information considered in connection with the decision, including: . . . supporting technical information and analyses, reports, data files, graphs, charts . . .” <sup>58</sup>
NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Technical and scientific information, such as stock assessments, surveys, modeling reports, etc. available for consideration by the decision-maker.” <sup>59</sup>

<sup>53</sup> EPA Guidance, *supra* note 5, at 9.

<sup>54</sup> DOI Guidance, *supra* note 4, at 6.

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 6; *accord* Goldfrank, *supra* note 10, at 9.

<sup>57</sup> EPA Guidance, *supra* note 5, at 7.

<sup>58</sup> *Id.* at 8; *accord* Goldfrank, *supra* note 10, at 8 (“Data files, graphs, [and] charts . . . should be included.”).

<sup>59</sup> NOAA Guidance, *supra* note 8, at 7.

## 6. Draft Materials and Intra-Agency Comments

Agency	Guidance
DOI	<p>“Examples of relevant, supporting documents include . . . [d]rafts of primary or relevant documents indicating substantive deliberations or discussions.”<sup>60</sup></p> <p>“Drafts that help substantiate the agency’s decision-making process should be included in the Decision File.”<sup>61</sup></p> <p>“The following types of documents, although they may be appropriate for inclusion in the Decision File, typically should not be included in the AR: . . . [d]rafts of documents that simply agree with previous drafts or represent mere grammatical edits and do not contain significant additional substantive comments.”<sup>62</sup> “Only drafts that help substantiate and evidence the decision-making process should be included in the AR. Drafts of documents that simply agree with previous drafts or represent primarily grammatical edits or were not circulated outside the author’s immediate office or working group typically should not be included in an AR. For example, drafts may contain unique information such as an explanation of a substantive change in the text of an earlier draft, or substantive notes that represent suggestions or analysis tracing the decision-making process.”<sup>63</sup></p>
EPA	<p>EPA guidance does not explain whether or not personnel should associate draft materials with a rulemaking record during an informal rulemaking proceeding. EPA guidance does instruct personnel to exclude “drafts of the decision document and comments by EPA personnel on that document” from the administrative record for judicial review.<sup>64</sup></p>
IRS	<p>The legal file should contain “[a]ll significant drafts of the regulation” and “internal comments.”<sup>65</sup></p>
NOAA	<p>“Development of an agency action will often result in many iterations or drafts of various documents, many of which may not contain unique information or significant changes from other versions. The practice of revising or commenting on draft documents is now done largely via electronic ‘redline and strikeout’ edits and electronic comment ‘balloons.’ Including every version of a document, whether edited electronically or by hand, in an Administrative Record could be burdensome and impractical; however, determining which drafts to include can be challenging. The following principles must be applied in close consultation with the appropriate NOAA General Counsel’s Office attorney:</p>

<sup>60</sup> DOI Guidance, *supra* note 4, at 4. The Working Group will discuss best practices for associating print publications with rulemaking records at a subsequent meeting.

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.* at 10.

<sup>64</sup> EPA Guidance, *supra* note 5, at 9.

<sup>65</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

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- “‘Significant’ Drafts – Significant drafts must be included in the Administrative Record *if* ideas in the draft reflect significant input into the decision-making process. Significant input may exist, for example, if the document reflects alternative approaches, grounded in fact, science, or law, to resolving a particular issues or alternative interpretations of factual, scientific, or legal inputs. . . .
  - “Working Drafts – Working drafts (preliminary, interim, rough) are to be excluded from the Administrative Record.<sup>66</sup> Working drafts do not reflect significant input into the decision-making process. Working drafts are also any drafts that contain only stylistic, typographical or grammatical edits, or other purely editorial suggestions in comment bubbles.
  - “Drafts with Independent Legal Significance – Final draft documents with independent legal significance, such as final draft environmental impact statements, are to be included in the Administrative Record . . . .”<sup>67</sup>
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## 7. Electronic Communications (Email)

Agency	Guidance
DOI	<p>“Documentation of electronic . . . communications (such as emails) should be maintained in the Decision File only if relevant, substantive, and if they document the decision-making process.”<sup>68</sup></p> <p>“Contemporaneous memoranda that document . . . confusing emails . . . should be written or collected and placed in the Decision File.”<sup>69</sup></p> <p>“Examples of relevant, supporting documents include . . . [m]emoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant electronic communications and their attachments.”<sup>70</sup></p> <p>“Examples of relevant, supporting documents include . . . [e]lectronic communications or other internal communications, such as emails and their attachments, which contain factual information, substantive analysis or discussion, or that document the decision-making process.”<sup>71</sup></p>

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<sup>66</sup> “As previously stated, whether a document should be included in the Administrative Record is a different consideration from whether it should be retained for agency record-keeping pursuant to the Federal Records Act. To be clear, documents or materials not included in the Administrative Record must nevertheless be retained, as necessary, in accordance with NOAA’s general records management practices.” NOAA Guidance, at 10 n.20.

<sup>67</sup> NOAA Guidance, *supra* note 8, at 10; *accord* Goldfrank, *supra* note 10, at 9.

<sup>68</sup> DOI Guidance, *supra* note 4, at 4.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 6.

<sup>71</sup> *Id.*

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“The following types of documents, although they may be appropriate for inclusion in the Decision File, typically should not be included in the AR: . . . [e]lectronic communications, including emails, which do not contain factual information, a substantive analysis or discussion, or information documenting the agency decision-making process.”<sup>72</sup>

“*General Guidelines for Electronic Communications.* Only electronic information and electronic communications, such as emails, that contain relevant factual information, a substantive analysis or discussion that formed a material part of the decision-making process, or that actually document the agency decision-making process should be included in the AR. As a general rule of thumb, the great majority of email ‘chatter’ about a decision need not be included in the AR. For example, emails should be included in the AR if they propose or discuss substantive changes to a draft primary document, or if they document substantive supervisory instructions to staff relating to the decision-making process. Such emails that are exchanged between the agency decision-maker, other agencies, stakeholders or representatives from outside parties should also generally be included if they substantively document the decision process. On the other hand, emails that merely set up a meeting or transmit an attached document, or that do not contain substantive relevant information generally do not need to be included in the AR.”<sup>73</sup>

“*Confusing chain messages.* Ideally, employees should use care in drafting and sending emails to avoid later confusion in interpreting the chain of communication. Emails with numerous attachments or that contain a commingling of personal and agency information and email chains with multiple parties and topics can lead to confusion and misinterpretation of the intended communication, especially when a long period of time has passed and the reader is less familiar with the subject matter. It may be difficult for an outside party, such as a court, to determine the actual context of an email or portion of an email without relevant attachments or all the emails in a chain. When several separate responses are sent in reply to one original message, the original message should remain attached to each of the responses.”<sup>74</sup>

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EPA	EPA guidance does not explain whether or not personnel should associate intra-agency emails with a rulemaking record during an informal rulemaking proceeding. EPA guidance does instruct personnel to exclude “emails generated prior to the decision and containing solely internal pre-decisional deliberations related to the decision, such as emails between EPA program staff and attorneys related to the decision” from the administrative record for judicial review. <sup>75</sup>
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<sup>72</sup> *Id.* at 8.

<sup>73</sup> DOI Guidance, *supra* note 4, at 8-9.

<sup>74</sup> *Id.* at 9.

<sup>75</sup> EPA Guidance, *supra* note 5, at 9.

IRS	The legal file should contain “[p]ertinent . . . email communications (in reverse chronological order).” <sup>76</sup>
NOAA	<p>“Development of an agency action will often result in communications, sometimes extensive, among agency personnel. These internal communications will be comprised, in large part, of electronic mail messages (email) or informal memoranda, and must be identified for inclusion in the record if they are relevant and directly or indirectly considered. . . . To the extent that internal communications contain factual or analytical information or directions from management not otherwise captured in the record, they should be included in the record . . . .”</p> <p>“Because of the extensive use of email now, email deserves special attention. Email is an important means of communication. However, email itself is merely a medium, and it is not the best way to document agency decisionmaking. Often an email will contain only the personal opinion or analysis of an individual employee that may or may not accurately reflect the position or analysis of the agency. An email may also contain preliminary conclusions, thoughts, and opinions based on incomplete information. For these reasons, agency employees should give careful consideration to the content of emails they draft and send.</p> <p>“To be clear, relevant email messages are part of the agency decision-making process and will be included in the Administrative Record as appropriate. Nevertheless, a best practice is that if an internal email is the exclusive source of particular facts or data that are relevant to the decision, the sender of the email should incorporate the information in a signed and dated memorandum to be placed in the file. And, generally, if an internal email contains factual information or analysis that is relevant to the agency decision, the substance of that email should be included in the final decision document, or supplemental memoranda relied on by the decision-maker (or incorporated by reference in documents relied on by the decision-maker).”<sup>77</sup></p>

## 8. Interagency Communications

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [c]ommunications and other information received from . . . other agencies and any responses to these communications. These communications can be unsolicited, the result of informal communications . . . , or part of a formal process . . . .” <sup>78</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . correspondence and emails from other federal agencies that provide factual, scientific or technical

<sup>76</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>77</sup> NOAA Guidance, *supra* note 8, at 15.

<sup>78</sup> DOI Guidance, *supra* note 4, at 6; *accord* Goldfrank, *supra* note 10, at 8–9.

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information related to the decision or that reflect the other agencies’ official views about the EPA decision . . .”<sup>79</sup>

“[O]fficial memoranda from another federal agency are not deliberative, and should be included in the administrative record, if they were sent as part of consultations required by statute or regulation and if they express the other agency’s views on the EPA decision or a particular stage of the decision . . .”<sup>80</sup>

EPA guidance explains that “[d]eliberative materials shared between EPA and other federal government agencies that EPA is consulting with as part of the decision-making process (for example, the Office of Management and Budget (OMB)) are treated the same as internal EPA documents are treated the same as internal EPA documents” for purposes of compiling an administrative record for judicial review.

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## 9. Internal Workflow Materials

Agency	Guidance
IRS	The legal file should contain “[a] copy of the CASE-MIS control screen,” “[t]he green circulation and pink circulation documents,” “transmittal memos,” and “[a]dministrative memos and forms – CASE-MIS form, 7-point memo, completed Regulatory Flexibility Act checklist, closing memo, plain language summaries, Executive Summary, Background Memorandum . . .” <sup>81</sup>

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## 10. Legally Required Analyses<sup>82</sup>

Agency	Guidance
EPA	“The record also includes documentation to support findings under relevant statutory authorities, regulatory authorities, or executive orders, such as the economic analysis prepared pursuant to Executive Order (EO) 12866, analyses of the economic impacts on small entities prepared under the Regulatory Flexibility Act, and records of consultations required by the Unfunded Mandates Reform Act and consultations undertaken pursuant to EPA’s tribal policy.” <sup>83</sup>
IRS	The legal file should contain “material prepared pursuant to the Paperwork Reduction Act and Congressional Review Act/Small Business Regulatory Fairness Enforcement Act” and “[f]inal Congressional Review Act material including Acknowledgment of Receipt forms from the Senate, House of Representatives, and GAO.”

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<sup>79</sup> EPA Guidance, *supra* note 5, at 8.

<sup>80</sup> *Id.* at 9.

<sup>81</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>82</sup> *Accord* Recommendation 2013-4, *supra* note 1, ¶ 1(e).

<sup>83</sup> EPA Guidance, *supra* note 5, at 8.

NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Required analyses that support the final agency action, such as the Environmental Impact Statement or Environmental Assessment under NEPA, Biological Opinions (where NOAA is the action agency), or Regulatory Flexibility Analyses under the Regulatory Flexibility Act.” <sup>84</sup>
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## 11. Legal Materials and Agency Policies and Directives

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . Departmental, Office, and Bureau policies, guidelines, directives, and manuals.” <sup>85</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA information considered in connection with the decision, including: . . . guidance, manuals, policies and directives . . .” <sup>86</sup>
IRS	The legal file should contain “IRS and Treasury memos.” <sup>87</sup> “The legal file should contain: . . . A record of all cases, statutes, regulations, legislative history, treaties, or other legal documents considered during the drafting process (for hard-to-find documents, copies of the documents themselves should be included).” <sup>88</sup>
NOAA	“When . . . directives, and manuals are important to the decision, they must be cited. The Custodian must use his or her judgment in deciding whether voluminous background materials should be physically inserted in the Administrative Record or incorporated by reference. The Custodian may consider inserting excerpts as appropriate, for example when materials are not readily available to the public.” <sup>89</sup>

## 12. Meetings and Oral Communications (External)<sup>90</sup>

Agency	Guidance
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . transcripts from hearings . . .” <sup>91</sup>
FDA	The “record of the administrative proceeding” includes “transcripts” and “minutes of meetings” but not “the transcript of a closed portion of a public advisory committee meeting.” <sup>92</sup>

<sup>84</sup> NOAA Guidance, *supra* note 8, at 7.

<sup>85</sup> DOI Guidance, *supra* note 4, at 6; *accord* Goldfrank, *supra* note 10, at 8 (“Include policies, guidelines, directives, and manuals.”).

<sup>86</sup> EPA Guidance, *supra* note 5, at 8.

<sup>87</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>88</sup> *Id.* § 32.1.2.1.

<sup>89</sup> NOAA Guidance, *supra* note 8, at 7-8.

<sup>90</sup> *Accord* Recommendation 2013-4, *supra* note 1, ¶ 1(c).

<sup>91</sup> EPA Guidance, *supra* note 5, at 8.

<sup>92</sup> 21 C.F.R. § 10.40(g)(6).

IRS	The legal file should contain “[p]ublic hearing agendas, copies of sign-in sheets, speaking outlines, and notes,” and “[r]ecords of any meetings with members of the public, including a list of attendees and the date, time, and place of the meeting; any documents received; and notes taken during the meetings.” <sup>93</sup>
NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Transcripts, minutes, or summaries of meetings with members of the public to discuss the agency’s proposed action as well as any recorded minutes of those meetings. Other public-meeting documents for inclusion in the Administrative Record include, for example, power-point presentations, agendas, and other handouts, provided either by the agency or the public.” <sup>94</sup>

### 13. Meetings and Oral Communications (General)

Agency	Guidance
DOI	<p>“Substantive meetings that are relevant to the decision-making process should be sufficiently documented.”<sup>95</sup> “Examples of relevant, supporting documents include . . . [m]inutes, transcripts of meetings, and other memorializations of telephone conversations and meetings, including personal memoranda or handwritten notes that were circulated to colleagues or added to the Decision File.”<sup>96</sup></p> <p>“Contemporaneous memoranda that document relevant oral communications . . . should be written or collected and placed in the Decision File.”<sup>97</sup></p> <p>“Examples of relevant, supporting documents include . . . [m]emoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant . . . meetings, and phone conversations.”<sup>98</sup></p>
EPA	<p>“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA information considered in connection with the decision, including: . . . official meeting notes or transcripts . . .”<sup>99</sup></p> <p>“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . documents generated by EPA that memorialize phone calls that provided relevant factual information or public comments not otherwise provided in written form . . .”<sup>100</sup></p>

<sup>93</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>94</sup> NOAA Guidance, *supra* note 8, at 71; *accord* Goldfrank, *supra* note 10, at 9.

<sup>95</sup> DOI Guidance, *supra* note 4, at 4.

<sup>96</sup> *Id.* at 6-7; *accord* Goldfrank, *supra* note 10, at 9.

<sup>97</sup> *Id.*

<sup>98</sup> DOI Guidance, *supra* note 4, at 6.

<sup>99</sup> EPA Guidance, *supra* note 5, at 8.

<sup>100</sup> *Id.* at 8.

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EPA guidance does not explain whether or not personnel should associate meeting notes with a rulemaking record during an informal rulemaking proceeding. EPA guidance does instruct personnel to exclude “personal notes documenting internal meetings” from the administrative record for judicial review.<sup>101</sup>

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#### 14. Memoranda to the File

Agency	Guidance
DOI	“Examples of relevant, supporting documents include: . . . Memoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant electronic communications and their attachments, meetings, and phone conversations.” <sup>102</sup>
NOAA	“NOAA employees involved in NOAA decision-making must ensure that the facts or data contained in deliberative materials (which may include emails and significant drafts), and points of view that are relevant to the decision-maker’s consideration of the decision, are addressed in one or more of the following formats: 1) the decision documents themselves; 2) ancillary documents accompanying the final decision; or 3) a signed and dated memorandum to the file. To the extent that NOAA employees elect to draft a memorandum to the file, best practice is to provide any such memorandum to an agency manager within the decision-making chain to ensure that the facts, analysis, or points of view contained in the memorandum are properly considered during the decision-making process.” <sup>103</sup>

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#### 15. Personal Notes<sup>104</sup>

Agency	Guidance
DOI	<p>“The following types of documents, although they may be appropriate for inclusion in the Decision File, typically should not be included in the AR: . . . [p]ersonal notes, journals, appointment calendars or memorializations maintained by an individual solely for personal use and not circulated to colleagues or added to the agency file.”<sup>105</sup></p> <p>“In general, documents that were created solely for an employee’s personal convenience, even if they help that employee perform his or her official duties, should not be included in the AR. As a result, diaries, journals, ‘to-do’</p>

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<sup>101</sup> *Id.* at 9.

<sup>102</sup> DOI Guidance, *supra* note 4, at 7.

<sup>103</sup> NOAA Guidance, *supra* note 8, at 14.

<sup>104</sup> See Goldfrank, *supra* note 10, at 8 (“[H]andwritten notes should also be included. Do not include personal notes, meaning an individual’s notes taken at a meeting or journals maintained by an individual, [in an administrative record for judicial review] unless they are included in an agency file. Agency control, possession, and maintenance determine an agency file.”).

<sup>105</sup> DOI Guidance, *supra* note 4, at 8.

lists, personal notes and personal calendars that were created for the author’s personal use and that were not distributed to other employees typically should not be included in the AR. However, documents that an employee was required to create or maintain or that were distributed to or relied on by colleagues and/or the decision-maker and contain information related to the decision-making process should typically be included in an AR. If an employee takes relevant handwritten notes at a meeting and later gives copies of his or her notes to colleagues who were unable to attend the meeting, the notes should be included in an AR if there is no other documentation of the meeting. However, in those situations where a personal memorialization is the only evidence that a relevant meeting occurred or contains substantive evidence relevant to the decision-making process, it may be necessary to include a personal memorialization in an AR.”<sup>106</sup>

EPA	EPA guidance does not explain whether or not personnel should associate personal notes with a rulemaking record during an informal rulemaking proceeding. EPA guidance does instruct personnel to exclude “personal notes documenting internal meetings” from the administrative record for judicial review. <sup>107</sup>
IRS	The legal file should contain “[p]ertinent handwritten notes.” <sup>108</sup>
NOAA	NOAA Guidance does not specify whether personnel should add any personal notes to the rulemaking record but explains that “[p]ersonal notes or journals developed by an individual for his or her own use are generally excluded from the Administrative Record.” <sup>109</sup>

## 16. Previous Rulemaking Materials

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [d]ocuments contained in previous ARs that were relied upon or considered in the decision-making process (even if not being challenged by the current litigation).” <sup>110</sup>
NOAA	“Sometimes a NOAA action builds on a prior related decision. In those cases, the Custodian must consider whether any prior related decision documents should be included in the current Administrative Record. If the prior related decision resulted in litigation, the Custodian must also consider whether material from any Administrative Record supporting the earlier decision should be included in the current Administrative Record.” <sup>111</sup>

<sup>106</sup> *Id.* at 9-10.

<sup>107</sup> EPA Guidance, *supra* note 5, at 9.

<sup>108</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>109</sup> NOAA Guidance, *supra* note 8, at 9. “As a general matter, personal notes are maintained by agency personnel for their own use and are not made part of the agency filing system. A few courts have defined personal notes as those ‘that are solely used by the employee who created them and are not available to other agency employees.’ *See e.g., Sibille v. Fed. Reserve Bank of New York*, 770 F. Supp. 134, 137 (S.D.N.Y. 1991).” *Id.* n.18.

<sup>110</sup> DOI Guidance, *supra* note 4, at 6..

<sup>111</sup> NOAA Guidance, *supra* note 8, at 8.

## 17. Publications (Electronic)

Agency	Guidance
DOI	“Documentation of electronic information (such as that found on websites) should be maintained in the Decision File only if relevant, substantive, and if they document the decision-making process.” <sup>112</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . hard copy printouts of any website information that is cited in the decision or relied on . . .” <sup>113</sup>
NOAA	“When NOAA takes information contained on websites into account in making the decision, the Administrative Record must contain a hard copy of the information presented on the relevant web pages, including the internet address (URL) and date that it was downloaded, to ensure that the information relied on is preserved in the event that the web site content changes.” <sup>114</sup>

## 18. Publications (General)

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [a]rticles, books and other publications.” <sup>115</sup>
EPA	“The administrative record should . . . include the scientific or technical literature . . . considered by the decision-maker, including his/her staff, in developing the Agency’s final position.” <sup>116</sup>
IRS	The legal file should contain “[a]rticles or other documents that were considered during the drafting process.” <sup>117</sup>
NOAA	“When background documents (e.g., scientific literature such as journals or text) . . . are important to the decision, they must be cited. The Custodian must use his or her judgment in deciding whether voluminous background materials should be physically inserted in the Administrative Record or incorporated by reference. The Custodian may consider inserting excerpts as appropriate, for example when materials are not readily available to the public.” <sup>118</sup>

<sup>112</sup> DOI Guidance, *supra* note 4, at 4.

<sup>113</sup> EPA Guidance, *supra* note 5, at 8.

<sup>114</sup> NOAA Guidance, *supra* note 8, at 8.

<sup>115</sup> DOI Guidance, *supra* note 4, at 4; *accord* Goldfrank, *supra* note 10, at 8 (“Include articles and books.”).

<sup>116</sup> EPA Guidance, *supra* note 5, at 7.

<sup>117</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>118</sup> NOAA Guidance, *supra* note 8, at 7-8.

## 19. Public Comments and Petitions<sup>119</sup>

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [c]ommunications and other information received from the public . . . and any responses to these communications. These communications can be unsolicited, the result of informal communications . . . , or part of a formal process . . . .” <sup>120</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . correspondence with members of the public, . . . public comments submitted to EPA, and the responses to those comments . . . .” <sup>121</sup>
FDA	The “record of the administrative proceeding” includes “[a]ll comments received on the proposal, including all information submitted as part of the comments,” as well as any rulemaking petitions or petitions for reconsideration or a stay of action. <sup>122</sup>
IRS	“The legal file should contain: . . . Public comment letters.” <sup>123</sup>
NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Any materials submitted to the agency pertinent to the action, including all Federal Register Notices pertaining to a rulemaking (Advanced Notice of Proposed Rulemaking, Notice of Proposed Rulemaking, Final Rule, etc.).” <sup>124</sup>  “The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Comments the agency receives during any review process and any agency response to those comments.” <sup>125</sup>

## 20. Public Notices<sup>126</sup>

Agency	Guidance
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA information considered in connection with the decision, including: the proposed action (if the decision was preceded by a public proposal) . . . .” <sup>127</sup>  “Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA’s final decision document. The final decision document is the document signed by the Agency official authorized to make the decision, such as the final rule signed

<sup>119</sup> *Accord Recommendation 2013-4, supra note 1, ¶ 1(b).*

<sup>120</sup> DOI Guidance, *supra* note 4, at 6.

<sup>121</sup> EPA Guidance, *supra* note 5, at 8.

<sup>122</sup> 21 C.F.R. § 10.40(g)(2)–(3).

<sup>123</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>124</sup> NOAA Guidance, *supra* note 8, at 7.

<sup>125</sup> *Id.* at 7.

<sup>126</sup> *Accord Recommendation 2013-4, supra note 1, ¶ 1(a).*

<sup>127</sup> EPA Guidance, *supra* note 5, at 8

	by the Administrator, or the final determination or approval/disapproval document.” <sup>128</sup>
FDA	The “record of the administrative proceeding” includes the “proposed rule published in <i>Federal Register</i> , including all information identified or filed by the Commissioner with the Division of Dockets Management on the proposal;” “[t]he notice promulgating the final regulation, including all information identified or filed by the Commissioner with the Division of Dockets Management as part of the administrative record of the final regulation;” and any other relevant “ <i>Federal Register</i> notice.” <sup>129</sup>
IRS	The legal file should contain a “Federal Register reprint.” <sup>130</sup>
NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . The final decision document . . . signed by the agency official with delegated authority to make a decision on behalf of the agency.” <sup>131</sup>

## 21. Publicly Released or Publicly Available Materials

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [d]ocuments that have been released to the public, such as through a [Freedom of Information Act] request, or are available to the public, including on the Internet.” <sup>132</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . EPA information considered in connection with the decision, including: . . . documents shared between EPA and outside parties . . .” <sup>133</sup>

EPA Guidance explains that “[f]or purposes of compiling administrative records, a document remains ‘deliberative’ even if it has been made public; decisions regarding what documents are part of EPA’s administrative record do not depend on whether the documents are ‘privileged’ or have been released to the public as part of a docket or in response to a FOIA request.” EPA Guidance does not, however, explain whether personnel should add such materials to rulemaking records during informal rulemaking proceedings.<sup>134</sup>

<sup>128</sup> *Id.* at 9.

<sup>129</sup> 21 C.F.R. § 10.40(g)(3), (5), (6).

<sup>130</sup> IRS Guidance, *supra* note 7, § 32.1.2.1.

<sup>131</sup> NOAA Guidance, *supra* note 8, at 7.

<sup>132</sup> DOI Guidance, *supra* note 4, at 6.

<sup>133</sup> EPA Guidance, *supra* note 5, at 8.

<sup>134</sup> *Id.* at 10.

## 22. Referenced Materials

Agency	Guidance
DOI	“Examples of relevant, supporting documents include . . . [d]ocuments cited as a reference of a primary document, such as a bibliography . . . .” <sup>135</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . the referenced cited in the decision, including court opinions and official EPA documents, as well as the important references that are cited in scientific papers upon which EPA relied. While cited references can also be considered part of the administrative record without being listed separately, it is best to separately include them to be clear about which documents EPA considered in its decision-making process. Note that copyright may affect how we make referenced material available, but does not affect whether it is part of an administrative record.” <sup>136</sup>
NOAA	“The Custodian must use his or her best judgment, in consultation with a NOAA General Counsel’s Office attorney if necessary, in deciding whether documents incorporated by reference within relevant documents (or relevant portions thereof) should be included in the Administrative Record. Generally, documents NOAA cites in its decision should be included in the Administrative Record; however, NOAA is not obligated to reproduce every document that someone else has cited.” <sup>137</sup>

## 23. State Government Communications

Agency	Guidance
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . Information shared with the States. Except in the unusual case where a State is acting solely as EPA’s consultant during a decision-making process, documents generated by, with, or shared among EPA and State personnel that are considered by EPA in connection with the decision are not likely to be considered ‘deliberative.’ As a result, these documents should be in the administrative record even if the document is draft or reflects preliminary discussions between EPA and state personnel.” <sup>138</sup>

### OVERINCLUSION AND CONSULTATION

A trend that emerges from reviewing existing guidance is that agencies have developed more detailed guidance with respect to certain categories of materials: electronic communications (email), electronic publications (websites), draft materials, and personal notes. This is likely due to both the frequency and volume at which personnel generate or consult such

<sup>135</sup> DOI Guidance, *supra* note 4, at 6.

<sup>136</sup> EPA Guidance, *supra* note 5, at 8.

<sup>137</sup> NOAA Guidance, *supra* note 8, at 8.

<sup>138</sup> EPA Guidance, *supra* note 5, at 8.

materials, as well as the often-informal nature of their generation or consultation. Personnel may also face challenges preserving these materials, which the Working Group will consider in a separate, subsequent meeting.

Requiring personnel to preserve every email they send or receive, website they scroll through, stylistic or grammatical edit they make to draft rules, or scribble on a piece of paper would be time- and resource-intensive and could have the effect of chilling discussion, documentation, and research. On the other hand, information in these materials can be substantive and relevant to the agency’s decision. Instructing personnel to categorically exclude emails, websites, draft materials, and personal notes from rulemaking records could complicate the preparation, for example, of administrative records for judicial review.<sup>139</sup>

Agencies may attempt to strike a balance by encouraging personnel to add relevant and significant emails, websites, drafts, and personal notes to a rulemaking record while giving them leeway to take no action with respect to less significant materials. The difficulty is clearly explaining to personnel which emails, websites, drafts, and notes are sufficiently relevant and significant for inclusion in rulemaking records, such that personnel can quickly, accurately, and consistently make those determinations themselves.<sup>140</sup> The Working Group may wish to consider best practices for explaining to personnel—especially non-lawyers, employees with limited experience in rulemaking projects, and political appointees—which materials they can safely exclude from rulemaking records.

Some agencies may err on the side of defining the rulemaking record narrowly. Given the difficulty of the task, other agencies seem to define the rulemaking record broadly and encourage rulemaking personnel to err on the side of associating materials with a rulemaking record when questions of significance or relevance arise.<sup>141</sup> Encouraging overinclusion may ensure that personnel responsible for managing public rulemaking dockets, obtaining a decision maker’s decision, or certifying an administrative record for judicial review, have easy access to all documents they need. Overinclusion may also leave complicated and time-consuming decisions about what information is irrelevant, insignificant, privileged, sensitive, or protected to specialized, centralized personnel. DOI Guidance, for example, explains that “[w]hen questions arise about which documents to include, the AR Coordinator should initially include the documents in the AR and then consult with the Office of the Solicitor.”<sup>142</sup>

There are costs and benefits associated with both approaches, and the approach an agency chooses to communicate to personnel likely depends on the circumstances of agency rulemaking projects. As Beck explains:

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<sup>139</sup> Beck, *supra* note 3, at 32.

<sup>140</sup> See, e.g., DOI Guidance, *supra* note 4, at 7 (“Determinations of relevance may be complicated, affecting the content of the AR and the defense of the agency decision, and should be made in consultation with the Office of the Solicitor.”).

<sup>141</sup> See Beck, *supra* note 3, at 28; cf. Kelly Dunbar, James Barton & Megan Yan, *Federal Agencies Need a Uniform Record-Keeping Process*, LAW360 (July 15, 2019), <https://www.wilmerhale.com/-/media/893f4d1e4988406bb84ac855fc08f9f8.pdf>.

<sup>142</sup> DOI Guidance, *supra* note 4, at 8.

An agency must expend considerable effort and scarce resources to compile a full rulemaking record for every rulemaking that it undertakes. That expenditure must be balanced against the actual risk of litigation and subsequent requirement that it file an administrative record. The risk analysis is not easy to quantify and many agencies may find that litigation risks do not justify the compilation of voluminous records in each and every instance. An agency may have a limited litigation risk and very large and complex records. At the same time, some agencies compile a rulemaking record as a matter of routine because of the rulemaking frequency and to better manage internal processes. Accordingly, the balance that must be struck is best analyzed by the agency and its litigators . . . .<sup>143</sup>

Agencies may also “include consultation with counsel as part of the record preparation process to ensure that the rulemaking record is complete.”<sup>144</sup> For example, DOI Guidance, EPA Guidance, and NOAA Guidance all acknowledge that because identifying materials to include in rulemaking records can be highly contextual, personnel should consult with designated attorneys when questions arise.<sup>145</sup>

## **QUESTIONS FOR THE WORKING GROUP**

### ***Approaches to Explain to Personnel What Materials They Should Add to Rulemaking Records***

There are four principal approaches agencies currently employ to explain to personnel what they should add to rulemaking records: (i) explaining the uses of rulemaking records, (ii) providing a general standard for inclusion in rulemaking records, (iii) providing guidance on specific categories of materials, and (iv) encouraging overinclusion and consultation (see page 3).

- (1) Does the Working Group believe one or more of these approaches is clearer or more effective for communicating guidelines to personnel with diverse backgrounds?
- (2) What are the pros and cons of each of the four approaches?
- (3) Are there other approaches worth exploring?

### ***Approach 1: Purposes and Uses of Rulemaking Records***

- (4) Are there best practices agencies should consider following to clearly and effectively explain the uses and purposes of rulemaking records to personnel?

### ***Approach 2: General Guidelines***

- (5) Are there best practices agencies should consider following to clearly and effectively explain to personnel what activities constitute “consideration” of a material, especially the consideration of a *contrary* material?

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<sup>143</sup> Beck, *supra* note 3, at 44.

<sup>144</sup> *Id.* at 32.

<sup>145</sup> DOI Guidance, *supra* note 4, at 3–8; EPA Guidance, *supra* note 5, at 3–4; NOAA Guidance, *supra* note 8, at 8–9.

- (6) Are there best practices agencies should consider following to clearly and effectively explain to personnel other than the agency head or final decisionmaker when consideration of a material constitutes consideration of the material by “the agency”?

***Approach 3: Specific Guidelines***

- (7) What specific categories of materials should agencies, at a minimum, address in administrative records guidance?
- (8) Are there specific categories of materials for which agencies should consider developing more detailed guidance, such as emails, websites, drafts, and personal notes?
- (9) Are there best practices agencies should consider following to clearly and effectively explain to personnel which specific materials within those categories they should add to rulemaking records and which specific materials they need not add to rulemaking records?

***Approach 4: Overinclusion and Consultation***

- (10) How should agencies ensure that personnel add the optimal amount of materials to rulemaking records, for example by balancing the need for reasonably completed records with resource limitations and other agency priorities? Are there best practices to ensure that personnel consider these issues without spending excessive amounts of time deliberating over complicated legal distinctions or referring questions to designated officials or components?
- (11) Should agencies generally encourage personnel to err on the side of including materials in rulemaking records, or should they attempt to more clearly delineate which materials personnel should add?
- (12) When should agencies encourage personnel to contact a designated official or component when questions arise? Are there best practices for which office or individual agencies should designate?