



“Ex Parte” Communications in Informal Rulemaking

Committee on Rulemaking

Proposed Recommendation | June 5-6, 2014

1 Informal communications between agency personnel and individual members of the
2 public have traditionally been an important and valuable aspect of informal rulemaking
3 proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553.
4 Borrowing terminology from the judicial context, these communications are often referred to
5 as “ex parte” contacts.¹ The APA prohibits ex parte contacts in formal adjudications and formal
6 rulemakings conducted under the trial-like procedures of 5 U.S.C. § 556 and 557.² 5 U.S.C. §
7 553, however, imposes no comparable restriction in the context of informal rulemaking. The
8 term “ex parte” does not entirely fit in this non-adversarial context, and some agencies do not
9 use it. This recommendation uses the term because it is commonly used and widely
10 understood in connection with informal rulemaking. As used in this recommendation, “ex parte
11 communications” means: (i) written or oral communications; (ii) regarding the substance of an
12 anticipated or ongoing rulemaking; (iii) between the agency and interested persons; and (iv)
13 that are not placed in the rulemaking docket at the time they occur. It bears emphasizing that
14 such communications “are completely appropriate so long as they do not frustrate judicial
15 review or raise serious questions of fairness.”³

¹ In the judicial context, “ex parte” contacts are those that occur between just one of the parties involved in a lawsuit and the presiding judge, usually “without notice to or argument from the adverse party.” Black’s Law Dictionary (9th ed. 2009). Such contacts are generally viewed as highly unethical outside the procedural protections provided by applicable court rules.

² See 5 U.S.C. § 557(d).

³ Home Box Office, Inc. v. Federal Commc’ns Comm’n, 567 F.2d 9, 57 (D.C. Cir. 1977).



16 In Recommendation 77-3,⁴ the Conference expressed the view that a general
17 prohibition on ex parte communications in the context of informal rulemaking proceedings
18 would be undesirable, as it would tend to undermine the flexible and non-adversarial
19 procedural framework established by 5 U.S.C. § 553.⁵ At the same time, the Conference
20 concluded, it may be appropriate for agencies to impose certain restraints on ex parte
21 communications to prevent potential or perceived harm to the integrity of informal rulemaking
22 proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these
23 basic principles remain valid. Over the past several decades, agencies have implemented
24 Recommendation 77-3 by experimenting with procedures designed to capture the benefits of
25 ex parte communications while reducing or eliminating their potential harm. This
26 recommendation draws on this substantial experience to identify best practices for managing
27 ex parte communications received in connection with informal rulemakings.

28 Ex parte communications, which may be oral or written, convey a variety of benefits to
29 both agencies and the public. Although the rulemaking process has largely transitioned to
30 electronic platforms in recent years, most ex parte contacts continue to take the form of oral
31 communications during face-to-face meetings. These meetings can facilitate a more candid and
32 potentially interactive dialogue of key issues and may satisfy the natural desire of interested
33 persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates

⁴ Recommendation 77-3 emerged from a select committee the Conference convened in response to the D.C. Circuit's groundbreaking decision in *Home Box Office*. See Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 377 (1978). Following the recommendation's adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. See Nathanson, 30 ADMIN. L. REV. at 406-08.

⁵ See Admin. Conf. of the United States, Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).



34 sensitive information, ex parte communications may be an indispensable avenue for agencies
35 to obtain the information necessary to develop sound, workable policies.⁶

36 On the other hand, ex parte communications can pose several different kinds of harm
37 (both real and perceived) to the integrity of the rulemaking process. One difficulty is that
38 certain people or groups may have, or be perceived to have, greater access to agency personnel
39 than others. This unfairness, whether real or perceived, may be exacerbated if agency
40 personnel do not have the time and resources to meet with everyone who requests a face-to-
41 face meeting. Another concern is that agency decisionmakers may be influenced by
42 information that is not in the public rulemaking docket. The mere possibility of non-public
43 information affecting rulemaking creates problems of perception and undermines confidence in
44 the rulemaking process. When it becomes reality, it creates different and more serious
45 problems. Interested persons may be deprived of the opportunity to vet the information and
46 reply to it effectively. And reviewing courts may be deprived of information that is necessary to
47 fully and meaningfully evaluate the agency's final action.

48 Best practices for preventing the potential harms of ex parte communications may vary
49 depending on the stage of the rulemaking process during which the communications occur.
50 Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex
51 parte communications are desirable.⁷ Communications during this early stage of the process
52 are less likely to pose the harms described above and can help an agency gather essential

⁶ In such areas, interested persons may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the information shared with them confidential. *See, e.g.*, 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.

⁷ Recognizing these principles, the Clinton Administration directed agencies “to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule,” with the limited exception of “rules requiring the simple disclosure of the time, place, purpose, and participants of meetings.” *See* Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), available at [http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20\(1995\).txt](http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20(1995).txt) (last visited Mar. 10, 2014). This memorandum, which has never been revoked, continues to inform agency practice.



53 information, craft better regulatory proposals, and promote consensus building among
54 interested persons.⁸ After an NPRM has been issued and during the comment period, there
55 may be a heightened expectation that information submitted to the agency will be made
56 available to the public. Indeed, during this time period, an agency's comment policy and its
57 policy addressing ex parte communications may both apply.⁹ Finally, once the comment period
58 closes, the dangers associated with agency reliance on privately-submitted information become
59 more acute. At the same time, interested persons may be particularly keen during this stage to
60 discuss with the agency information provided in comments filed at or near the close of the
61 comment period. To prevent the most serious harms of this potentiality, agencies have in some
62 circumstances disclosed such information and reopened the comment period. This solution is
63 not costless, however, and has the potential to significantly delay a proceeding.

64 This recommendation focuses on how agencies can best manage ex parte
65 communications in the context of informal rulemaking proceedings, including those that
66 involve "quasi-adjudication among 'conflicting private claims to valuable privilege.'"¹⁰ It does
67 not address several related or peripheral issues. First, it does not evaluate formal or hybrid
68 rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures
69 to develop guidance documents. Second, it does not address issues related to ex parte
70 communications in the executive review process, including before the Office of Information and
71 Regulatory Affairs (OIRA).¹¹ Nor does it examine ex parte issues that may arise in the contexts
72 of interagency review and communications or intraagency interactions between an agency's

⁸ *See id.*

⁹ The Conference recently addressed agency comment policies. *See* Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

¹⁰ *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) (quoting *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959)). In such "quasi-adjudicatory" rulemakings, due process considerations may justify insulating the decisionmaker from ex parte contacts. *See id.*

¹¹ *See* Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989).



73 staff and its decisionmakers.¹² Finally, it does not address unique issues that may arise in
74 connection with communications between agencies and members of Congress, foreign
75 governments, or state and local governments.

RECOMMENDATION

76 1. The Administrative Conference reaffirms Recommendation 77-3, *Ex Parte*
77 *Communication in Informal Rulemaking Proceedings*.

78 “Ex Parte” Policies

79 2. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a
80 written policy explaining how the agency handles what this recommendation refers to as
81 nongovernmental “ex parte” communications, even if the agency does not use that term.

82 3. Agency ex parte policies should:

83 (a) Provide guidance to agency personnel on how to respond to requests from
84 interested persons for private meetings to discuss issues related to a rulemaking.

85 (b) Not apply to communications involving only non-substantive inquiries, such as those
86 regarding the status of a rulemaking or the agency’s procedures.

87 (c) Establish procedures for ensuring that, after an NPRM has been issued, the
88 occurrence and content of all substantive oral communications, whether planned or
89 unplanned, are included in the appropriate rulemaking docket.

90 (d) Establish procedures for ensuring that, after an NPRM has been issued, all written
91 communications are included in the appropriate rulemaking docket.

¹² See Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).



92 (e) Explain how the agency will treat significant new information submitted to the
93 agency after the comment period has closed.

94 (f) Identify deadlines for all disclosures of ex parte communications required or
95 requested under the agency's policy.

96 (g) Explain how the agency will treat sensitive information submitted in an ex parte
97 communication.

98 (h) Explain how the agency's ex parte communications policy interacts with its comment
99 policy.

100 4. In formulating policies governing ex parte communications in informal rulemaking
101 proceedings, agencies should consider the following factors:

102 (a) The stage of the rulemaking proceeding during which oral or written
103 communications may be received.

104 (b) The need to ensure that access to agency personnel is provided in a balanced,
105 viewpoint-neutral manner.

106 (c) Limitations on agency resources, including staff time, that may affect the ability of
107 agency personnel to accept requests for face-to-face meetings or prepare summaries of
108 such meetings.

109 (d) The likelihood that protected information will be submitted to the agency through
110 oral or written ex parte communications.

111 (e) The possibility that, even if an agency discourages ex parte communications during
112 specified stages of the rulemaking process, such communications may nonetheless
113 occur.



114 (f) The potential need to give agency personnel guidance about whether or to what
115 extent to provide information to persons not employed by the agency during a face-to-
116 face meeting.

117 **Communications before an NPRM is Issued**

118 5. Agencies should not impose restrictions on ex parte communications before an
119 NPRM is issued.

120 6. Agencies may, however, disclose, in accordance with ¶ 11 of this recommendation,
121 the occurrence or content of ex parte communications received before an NPRM is issued.

122 (a) Such disclosures may be made in the preamble of the later-issued NPRM or other
123 rulemaking document.

124 (b) Alternatively, agencies may post pre-NPRM written submissions and/or a summary
125 of pre-NPRM oral communications in the appropriate rulemaking docket once it is
126 opened.

127 **Communications after an NPRM Has Been Issued**

128 7. If an agency cannot accommodate all requests for in-person meetings after an
129 NPRM has been issued, it should consider holding a public meeting (which may be informal) in
130 lieu of, or in addition to, individual, private meetings.

131 8. After an NPRM has been issued, agencies should ensure the:

132 (a) Disclosure to the public of the occurrence of all oral ex parte communications,
133 including the identity of those involved in the discussion and the date and location of
134 the meeting.

135 (b) Disclosure to the public of the content of all oral ex parte communications through a
136 written summary filed in the appropriate rulemaking docket. Agencies may either:



137 (i) Direct their own personnel to prepare and submit the necessary summary; or

138 (ii) Request or require private persons to prepare and submit the necessary
139 summary of meetings in which they have participated, although it remains the
140 agency's responsibility to ensure adequate disclosure.

141 (c) Posting of all written submissions in the appropriate rulemaking docket.

142 **Additional Considerations after the Comment Period Has Closed**

143 9. Agencies should determine whether, and under what circumstances, ex parte
144 communications made after the close of the comment period should be permitted and, if so,
145 how they should be considered.

146 10. If an agency receives, through an ex parte communication, any significant new
147 information that its decisionmakers may consider or rely upon, it should disclose the
148 information and reopen the comment period, to provide the public with an opportunity to
149 respond.

150 11. When an agency receives a large number of requests for ex parte meetings after
151 the comment period has closed, it should consider using a reply comment period or offering
152 other opportunities for receiving public input on submitted comments. *See Admin. Conf. of the*
153 *United States, Recommendation 2011-2, Rulemaking Comments ¶ 6, 76 Fed. Reg. 48,791 (Aug.*
154 *9, 2011) (encouraging the use of reply comment periods and other methods of receiving public*
155 *input on previously submitted comments).*

156 **Quasi-Adjudicatory Rulemakings**

157 12. If an agency conducts "quasi-adjudicatory" rulemakings that involve conflicting
158 private claims to a valuable privilege, its ex parte communications policy should clearly and
159 distinctly articulate the principles and procedures applicable in those rulemakings.



160 13. Agencies should explain whether, how, and why they are prohibiting or restricting
161 ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex
162 parte communications in this context require a different approach from the one otherwise
163 recommended here.

164 14. Agencies should explain and provide a rationale for any additional procedures
165 applicable to ex parte communications received in quasi-adjudicatory rulemakings.

166 **Accommodating Digital Technology**

167 15. Agencies should consider how digital technology may aid the management or
168 disclosure of ex parte communications. For example, agencies may be able to use technological
169 tools such as video teleconferencing as a cost effective way to engage with interested persons.

170 16. Agencies should avoid using language that will inadvertently exclude ex parte
171 communications made via digital or other new technologies from their policies.

172 17. Agencies should state clearly whether they consider social media communications
173 to be ex parte communications and how they plan to treat such communications. Agencies
174 should ensure consistency between policies governing ex parte communications and the use of
175 social media.