



Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation for Committee | August 418, 2020

Commented [TR1]: *Note for Committee:* At the last meeting, the Committee discussed a few broad questions that went to the overall scope of the recommendation. We've briefly noted each of these points below and offered some background information for the Committee's consideration. The ACUS staff will revise the Preamble prior to the third meeting (on August 31) to clarify each of these three points, and the Committee should bear these points in mind while revising the text of the enumerated recommendations at its second (August 18) meeting.

- (1) The scope of the project is explicitly limited to protecting personal information and confidential commercial information—other types of protected information, such as national security information, are beyond the scope of the project (and were not addressed in the underlying research). The Preamble will be clarified so that it more explicitly captures this scope.
- (2) The scope of the project also is limited to addressing procedures for protecting materials that the agencies deem to be protected. The project is not intended to offer recommendations on what is or is not a protected material, though it will offer some illustrative examples of materials that are often protected as background information in the Preamble.
- (3) The Preamble will be amended to clarify the distinction between materials that agencies are legally required to withhold (under the Privacy, Trade Secrets Act, or some other source of law) and those that they are merely permitted but not otherwise required to withhold (e.g., those that may fall under a FOIA exemption but may not be subject to another other prohibition on disclosure).

1 The Administrative Conference has issued several recommendations to help agencies
2 balance the competing considerations of transparency and confidentiality in managing their
3 rulemaking dockets.¹ This project builds on these recommendations. It provides greater
4 specificity to agencies on how they should handle rulemaking materials they determine should be
5 withheld to protect sensitive business or personal information, notwithstanding any
6 countervailing benefits of disclosure (hereinafter “protected material”).

7 As part of the rulemaking process, an agency creates a public rulemaking docket, which
8 consists of all rulemaking materials the agency has: (1) ~~publicly disclosed under the Freedom of~~
9 ~~Information Act (FOIA);~~ (2) proactively published online; or (3) made available for public
10 inspection in a reading room. Public rulemaking dockets include materials agencies generate
11 themselves and comments agencies receive from the public. Broadly speaking, public
12 rulemaking dockets serve three purposes: providing the public with the information the agency

¹ ~~For example,~~ Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, the *Administrative Record in Informal Rulemaking*, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶ 11, 78 Fed. Reg. 41,358, 41,361 (July 10, 2013). See also Admin. Conf. of the U.S., Recommendation 89-7, Federal Regulation of Biotechnology, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).



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13 considered in a rulemaking, providing courts with a record for evaluating challenges to the rule,
14 and satisfying agency recordkeeping requirements.

15 Currently, agencies accept public comments for their public rulemaking dockets through
16 Regulations.gov and their own websites. Regulations.gov and agency websites that accept
17 comments expressly notify the public that the agency may publish the information it receives.²
18 When a person submits a comment to an agency, however, the agency does not immediately
19 publish the comment. Instead, agencies take time to review comments before publishing them.
20 Most agencies perform at least some kind of screening during this period.

21 Agencies perform this screening because, in maintaining their public rulemaking dockets,
22 they confront competing considerations of transparency and confidentiality. On the transparency
23 side, [the Freedom of Information Act \(FOIA\)](#) presumes disclosure of information requested by a
24 member of the public, subject to certain exceptions described below. And the *Portland Cement*
25 doctrine requires agencies to make publicly available the critical information — including
26 technical studies, staff reports, data, and methodologies — underlying proposed rules.³

27 But agencies often receive materials during rulemaking for which the law authorizes
28 withholding because of their content. For example, one of FOIA’s exemptions, called
29 “Exemption 6,” covers “personnel and medical files and other similar files the disclosure of
30 which would constitute an unwarranted invasion of privacy.”⁴ “Similar files” means any
31 information about a person, such as a name, address, or occupation, that can be used to identify
32 the person.⁵ In deciding whether Exemption 6 applies, courts determine whether disclosure
33 would constitute a “clearly unwarranted invasion of personal privacy.”⁶ In making this

² See Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets>.

³ See *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

⁴ 5 U.S.C. § 552(b)(6).

⁵ See *Cook v. Nat’l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014).

⁶ See *Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 361 (5th Cir. 2001).



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34 determination, they balance the privacy interests of the person to whom the information pertains
35 against society’s interest in learning about governmental processes. Privacy interests are greatest
36 when the projected harm from disclosure of the information includes identity theft and fraud.⁷
37 Privacy interests are minimal when a person has consented to the agency disclosing his or her
38 information. If an agency encounters information that falls under Exemption 6, FOIA authorizes
39 the agency to exclude it from the public rulemaking docket.

40 Another FOIA exemption, called “Exemption 4,” covers “trade secrets and commercial
41 or financial information obtained from an individual and confidential.”⁸ Information is
42 “confidential” within the meaning of Exemption 4 if it is “customarily . . . kept private or closely
43 held by the submitter” and the government has given some assurance to the submitter, either
44 explicitly or implicitly, that the information will not be publicly disclosed.⁹ The
45 Recommendation refers to these materials collectively as “confidential commercial information.”
46 An agency can assure a submitter that confidential commercial information will not be publicly
47 disclosed by, for example, directly communicating to the submitter an intent to not disclose his
48 or her confidential commercial information, posting a general notice informing submitters that
49 their confidential commercial information will not be disclosed, or engaging in an established
50 practice of not disclosing confidential commercial information.¹⁰ FOIA authorizes agencies to
51 exclude from their public rulemaking dockets information falling under Exemption 4.

52 There are three categories of material that, ~~according to the research underlying this~~
53 ~~Recommendation~~, agencies generally consider to be “protected materials.”¹¹ The first is unique
54 identification numbers, either of submitters themselves or of third parties, that create a high risk

⁷ See *id.* at 559364.

⁸ 5 U.S.C. § 552(b)(4).

⁹ See *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361 (2019).

¹⁰ See OFFICE OF INFORMATION POLICY, DEP’T OF JUSTICE, EXEMPTION 4 AFTER THE SUPREME COURT’S RULING IN *FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA* (Oct. 4, 2019), <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>.

¹¹ See *Yoo*, *supra* note 2, at 104, 124–26.



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55 of identity theft if disclosed. This category includes social security numbers, bank account
56 numbers, and passport numbers. The second category consists of two kinds of information:
57 information about the submitter submitted to the agency accidentally, and information pertaining
58 to someone other than the submitter. Information within this category includes names, email
59 addresses, physical addresses, medical information, and so on. The final category consists of
60 confidential commercial information provided to the agency under an assurance of
61 privacy protection from disclosure. Courts have generally authorized agencies to withhold
62 materials in all three of these categories under FOIA Exemptions 4 and 6.¹²

63 This Recommendation prescribes steps agencies can take to exclude from their public
64 rulemaking dockets protected material while still providing the public with the information upon
65 which the agency relied in formulating the proposed rule. These steps include, among others,
66 aggregating the data, which means delinking the data from the individuals to whom the data
67 belong and then presenting the data in a summarized form, such as a median. The
68 Recommendation also identifies resources that can help agencies implement ~~this~~the principle of
69 excluding from their public rulemaking dockets protected material while still providing the
70 public with the information upon which the agency relied in formulating the proposed rule.

RECOMMENDATION

Including Notifications for Members of the Public Before They Submit Comments or Otherwise Take Part in Rulemaking

71 1. Agencies should decide which classes of rulemaking materials should be withheld to
72 protect sensitive business or personal information, notwithstanding any countervailing
73 public benefits of disclosure (hereinafter “protected material”). In making this decision,

¹² See, e.g., *Taitz v. Astrue*, 806 F. Supp. 2d 214, 220 (D.D.C. 2011) (authorizing, under Exemption 6, withholding of social security numbers); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (authorizing, under Exemption 6, withholding of information pertaining to third parties); *Food Marketing Inst.*, 139 S. Ct. at 2361 (authorizing, under Exemption 4, withholding of confidential commercial information provided to the agency under an assurance of privacy protection from disclosure).

Commented [TR2]: At the Committee’s request, the numbered Paragraphs have been reordered as follows. Paragraphs 2 and 3 below were originally Paragraphs 13 and 14. Paragraphs 11 through 13 below were originally Paragraphs 2 through 4.



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- 74 agencies should be aware that other agencies generally deem the following classes of
 75 material to be protected material:
- 76 a. Unique identification numbers including social security numbers, bank account
 77 numbers, and passport numbers;
 - 78 b. Names, email addresses, physical addresses, incomes, medical information, and
 79 other kinds of personal information inadvertently submitted by the commenter or
 80 that pertain to third parties; and
 - 81 c. ~~Commercial~~Confidential commercial information provided to ~~the~~an agency under
 82 ~~an assurance~~the agency’s assurances of ~~privacy~~protection from disclosure.
- 83 2. To reduce the risk that agencies will inadvertently disclose protected material in
 84 connection with rulemakings, agencies should clearly notify the public about their
 85 treatment of protected material. An agency’s notifications should:
- 86 a. Inform members of the public that all comments submitted are subject to
 87 public disclosure;
 - 88 b. Instruct members of the public how they can submit comments anonymously,
 89 for example, by writing “Anonymous” in the name field on the online
 90 comment platform or by leaving the name field blank;
 - 91 c. Inform members of the public what weight, if any, the agency accords
 92 comments that are submitted anonymously;
 - 93 d. Inform members of the public whether the agency offers assurances of
 94 ~~privacy~~protection from disclosure for their confidential commercial
 95 information and if so, how to identify such information for the agency;
 - 96 e. Instruct members of the public never to submit unique identification numbers
 97 such as social security numbers and other kinds of personal or confidential
 98 commercial information that pertain to third parties, such as medical
 99 information and trade secrets;
 - 100 f. Advise members of the public to review their comments for the material
 101 identified above in e. and, if they find such material, to remove it;

Commented [TR3]: ACUS staff proposes moving this language to the Preamble and combining/reconciling it with language at 51-60.

Commented [TR4]: Adam J. White suggested a recommendation that encourages agencies, or perhaps the General Services Administration (GSA), to create a box that a member of the public could check to indicate that he or she is submitting confidential commercial information or personal information.

Commented [TR5]: The Committee began discussion of b. and c. last meeting, but did not reach a resolution. We informed the Committee that another ACUS project, titled *Mass, Computer-Generated, and Fraudulent Comments* is addressing the topic of anonymous comments and that we would provide the Committee with a description of that project as it relates to this topic. That description appears below:

One of the key issues addressed in the *Mass, Computer-Generated, and Fraudulent Comments* project will be whether or not the identity of the commenter matters, as it bears on whether or not agencies are likely to see mass, computer-generated, or fraudulent comments as a problem. The research team will therefore be interviewing agencies about whether or not they allow anonymous comments and, if so, whether and how those comments are treated differently from other comments. The project report and recommendation may ultimately contain one or more recommendations relating to anonymous comments insofar as they are relevant to agencies’ efforts to address mass, computer-generated, and fraudulent comments.



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- 102 g. Inform members of the public that they may request, during the period
103 between when a comment is received and when it is made public, that
104 personal information they inadvertently submitted be withheld;
105 h. Inform members of the public that they may request, after the agency has
106 published any comment, that personal or confidential commercial information
107 pertaining to themselves or to their dependents within the comment be
108 removed from public exposure; and
109 i. Inform members of the public that the agency reserves the right to redact or
110 aggregate any part of a comment if the agency determines that it constitutes
111 protected material, or may withhold a comment in its entirety if it determines
112 that redaction or aggregation would insufficiently prevent the disclosure of
113 this information.

114 3. An agency should include the notifications described in Paragraph ~~132~~ in at least the
115 following places:

- 116 a. Within the rulemaking document upon which the agency requests comments, such
117 as a notice of proposed rulemaking or an advanced notice of proposed
118 rulemaking;
119 b. Within the online comment submission form on Regulations.gov, or, if the agency
120 does not participate in Regulations.gov, on the agency's own comment
121 submission form;
122 c. Within any automatic emails that an agency sends acknowledging receipt of a
123 comment;
124 d. On any part of the agency's website that describes its rulemaking process; and
125 e. Within any notices of public meetings pertaining to the rule.

Commented [TR6]: During the first Committee meeting, Rebecca D. Orban (U.S. Coast Guard) suggested that this recommendation may be better directed to GSA than to agencies. The Committee bracketed it for further discussion during the next meeting.

Commented [TR7]: During the first Committee meeting, Ms. Orban suggested that this recommendation may be better directed to GSA than to agencies. She also suggested the option of a pop-up notification to commenters, in addition to automated emails. The Committee bracketed it for further during the next meeting discussion.

Deciding Whether To Offer Assurances of ~~Privacy For~~ Protection from Disclosure For Confidential Commercial Information

126 4. Agencies should recognize that there may be instances in which businesses want to
127 submit confidential commercial information, such as trade secrets, to inform the



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128 agencies' rulemaking efforts, but do not want such information to be made publicly
129 available. Agencies should decide whether they will offer assurances of ~~privacy~~protection
130 from disclosure for confidential commercial information. Factors that weigh in favor of
131 offering assurances of ~~privacy~~protection from disclosure include:

- 132 a. The agency has the resources to identify and withhold confidential
133 commercial information;
- 134 b. The agency receives a high volume of requests for ~~private~~protected treatment
135 of confidential commercial information;
- 136 c. The agency's rulemaking efforts can benefit from the agency's review of
137 confidential commercial information; and
- 138 d. The agency can identify no substitute for confidential commercial information
139 that would inform its rulemaking in a comparable manner.

140 5. Agencies that choose to offer assurances of ~~privacy~~for protection from disclosure for
141 confidential commercial information should decide how they will offer them. Agencies
142 can choose to inform submitters, directly upon submission, that they will accord
143 confidential commercial information ~~private~~protected treatment; post a general notice
144 informing submitters that confidential commercial information will be accorded
145 ~~private~~protected treatment; or both.

146 6. Agencies that choose to offer assurances of ~~privacy~~for protection from disclosure for
147 confidential commercial information should adopt policies to help them identify ~~such~~
148 information. Agencies should consider including the following, either in tandem or as
149 alternatives, as part of their policies:

- 150 a. Instructing submitters to write the word "Private," "Protected," or similar
151 language within the header of their submissions that contain confidential
152 commercial information;
- 153 b. Instructing submitters to flag the particular text within the comment that
154 constitutes confidential commercial information; and
- 155 c. Instructing submitters to submit both redacted and unredacted versions of a
156 comment that contains confidential commercial information.



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- 157 7. Agencies that choose to accord ~~private~~protected treatment for confidential commercial
158 information should withhold such material, using the techniques described in Paragraph
159 211 as appropriate.

Allowing Submitters to Notify the Agency, ~~Before the Agency Publishes the Comment,~~ of Material They Inadvertently Submitted

- 160 8. Agencies should give submitters an opportunity to alert relevant agency officials to any
161 personal information they inadvertently included in their comments. ~~To provide sufficient~~
162 ~~opportunity for people to notify the agency of inadvertently submitted personal~~
163 ~~information, agencies should delay publishing comments for a reasonable amount of time~~
164 ~~after they are received.~~
- 165 9. Agencies should ensure that the personal information submitters have identified as
166 inadvertently submitted is not publicly disclosed, or, if already disclosed, is removed as
167 promptly as possible.

Allowing People to Notify the Agency, After the Agency Publishes the Comment, of Personal and Confidential Commercial Information They Want Removed

- 168 10. Agencies should allow people to request that personal or confidential commercial
169 information pertaining to themselves or a dependent within the comment be removed
170 from public exposure. Agencies should review such requests and, upon determining that
171 the information subject to the request is, in fact, personal or confidential commercial
172 information, they should take all steps necessary to so remove it.

Screening ~~and Serubbing~~ Comments for Protected Material and Protecting Such Material from Disclosure

- 173 11. Agencies should screen comments for protected material. If, when screening, an agency
174 determines that a comment contains:
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- 177 a. *Isolated instances of protected material*, the agency should redact that material
178 and publish the rest of the comment. Redaction should be thorough enough to
179 prevent a person from discerning the redacted information, but not so broad as to
180 prevent the public from viewing non-protected material;
- 181 b. *Protected material pertaining to a large number of people*, the agency should
182 ~~aggregate such data and only publish the aggregated data.~~dlink the data from the
183 individuals to whom the data belong and present the data in a summarized form,
184 such as an average (hereinafter “aggregation”). Agencies should work with data
185 science experts and others in relevant disciplines to ensure that aggregation is
186 thorough enough to prevent someone from disaggregating the data (i.e., linking
187 the aggregated data with any person).
- 188 12. If redaction and aggregation would still permit a member of the public to identify the
189 redacted material, or disaggregate the aggregated material, the agency should withhold
190 the comment in its entirety.
- 191 13. Agencies should explore using a variety of computer-based tools to aid in their
192 identification of protected material. This exploration should include speaking with private
193 sector experts and technology-focused agencies such as the General Services
194 Administration’s Technology Transformation Service and the Office of Management and
195 Budget’s United States Digital Service to determine which tools are most appropriate and
196 how they can be best deployed given the agencies’ resources.

Describing Material an Agency Has Withheld

- 197 14. When agencies withhold from public disclosure personal or confidential commercial
198 information they have received from the public in connection with a rulemaking and on
199 which they have relied in formulating rules, they should describe the withheld material in
200 as much detail as possible without compromising its confidentiality. In doing so, agencies
201 should consider preparing explanatory staff or technical reports and should publish these



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reports on the parts of their websites that describe their rulemaking processes and within the preambles to final rules.