



## Protected Materials in Public Rulemaking Dockets

### Committee on Rulemaking

#### Proposed Recommendation for Committee | August 31, 2020

1 As part of the rulemaking process, an agency creates a public rulemaking docket, which  
2 consists of all rulemaking materials the agency has: (1) proactively published online or (2) made  
3 available for public inspection in a reading room. Public rulemaking dockets include materials  
4 agencies generate themselves and comments agencies receive from the public. Their purpose is  
5 to provide the public with the information that informed the agency’s rulemaking.<sup>1</sup>

**Commented [TR1]:** Changed per Andrew Simons’ (EPA) published comment (8/18/2020).

6 The Administrative Conference has issued several recommendations to help agencies  
7 balance the competing considerations of transparency and confidentiality in managing their  
8 rulemaking dockets.<sup>2</sup> This project builds on these recommendations. It specifies how agencies  
9 should handle rulemaking materials they determine should be withheld to protect personal and  
10 confidential commercial information (hereinafter “protected material”), notwithstanding any  
11 countervailing benefits of disclosure.

**Commented [TR2]:** ACUS staff flags this definition of “protected material” for Committee discussion.

<sup>1</sup> The public rulemaking docket is distinguished from the “the administrative record for judicial review,” which is intended to provide courts with a record for evaluating challenges to the rule and the “rulemaking record,” which consists of the public rulemaking docket and the administrative record for judicial review combined. See Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

<sup>2</sup> 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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12 The scope of the Recommendation is explicitly limited to protecting personal information  
13 and confidential commercial information. Other types of protected information, such as national  
14 security information and copyrighted materials, are beyond the Recommendation’s scope. The  
15 Recommendation is also limited to addressing procedures for protecting materials that agencies  
16 decide warrant protection. The Recommendation is not intended to offer suggestions on what is  
17 or is not a protected material.

18 Though not intended as an exhaustive list, the following types of information typically  
19 qualify as “protected materials” in most agencies. One category of protected materials covers  
20 unique identification numbers, either of submitters themselves or of third parties, that create a  
21 high risk of identity theft if disclosed. This category includes social security numbers, bank  
22 account numbers, and passport numbers. Another category consists of two kinds of personal  
23 information: information about the submitter submitted to the agency accidentally, and  
24 information pertaining to someone other than the submitter. Information within this category  
25 includes names, email addresses, physical addresses, medical information, and so on. A third  
26 category consists of confidential commercial information provided to the agency under an  
27 assurance of protection from disclosure.

28 Currently, agencies accept public comments for their public rulemaking dockets through  
29 Regulations.gov and their own websites. Regulations.gov and agency websites that accept  
30 comments expressly notify the public that the agency may publish the information it receives.<sup>3</sup>  
31 When a person submits a comment to an agency, however, the agency does not immediately  
32 publish the comment. Instead, the agency takes time to review comments before publishing  
33 them. Most agencies perform at least some kind of screening during this period.

34 [A revised legal analysis section will appear here. It will cover very briefly:

**Commented [TR3]:** Margy O’Herron (DOJ), in her published comment (8/26/2020), writes: “the three types of information described do not cover all of the information that agencies generally must protect. Although I acknowledge the comment indicating that the project will not define what is or is not protected material, omitting categories of information that are protected could be misleading. For example, the term ‘unique identification numbers’ on line [20] is much narrower than the definition of a record in the Privacy Act, which defines a protected record as ‘any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.’ 5 U.S.C. 522a(a)(4). Similarly, limiting personally identifiable information such as names and addresses to ‘accidentally’ submitted information (line [23]) suggests a narrower definition.”

<sup>3</sup> 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>.



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- 35 I. General obligations to disclose information underlying rules under the Administrative  
36 Procedure Act and the D.C. Circuit’s current interpretation thereof;
- 37 II. Legal obligations to withhold certain materials under the Privacy Act and the Trade  
38 Secrets Act; and
- 39 III. Exceptions to the Privacy Act for materials required to be released under FOIA and  
40 exceptions to the Trade Secrets Act for materials authorized by law to be disclosed]

41 This Recommendation prescribes steps agencies can take to exclude from their public  
42 rulemaking dockets protected material while still providing the public with the information upon  
43 which agencies relied in formulating the proposed rule.<sup>4</sup> These steps include, among others,  
44 aggregating the data, which means delinking the data from the individuals to whom the data  
45 belong and then presenting the data in a summarized form, such as a median. The  
46 Recommendation also identifies resources that can help agencies implement the principle of  
47 excluding from their public rulemaking dockets protected material while still providing the  
48 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**

- 49 1. Agencies should decide which classes of rulemaking materials should be withheld to  
50 protect personal or confidential commercial information (hereinafter “protected  
51 material”), notwithstanding any countervailing public benefits of disclosure.

**Commented [TR4]:** ACUS staff flags this definition of “protected material” for Committee discussion.

<sup>4</sup> Although some agencies permit the submission of anonymous and pseudonymous comments as a way of protecting personal material, the issue of anonymous and pseudonymous comments raises a number of legal and policy questions that are beyond the scope of this Recommendation. Accordingly, this Recommendation does not address the submission of anonymous and pseudonymous comments as a means of protecting personal information.



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- 52 2. To reduce the risk that agencies will inadvertently disclose protected material in  
53 connection with rulemakings, agencies should clearly notify the public about their  
54 treatment of protected material. An agency's notifications should:
- 55 a. Inform members of the public that comments are generally subject to public  
56 disclosure, except when disclosure is limited by law;
  - 57 b. Inform members of the public whether the agency offers assurances of  
58 protection from disclosure for their confidential commercial information and  
59 if so, how to identify such information for the agency;
  - 60 c. Instruct members of the public never to submit unique identification numbers  
61 such as social security numbers and other kinds of personal or confidential  
62 commercial information that pertain to third parties, such as medical  
63 information and trade secrets;
  - 64 d. Advise members of the public to review their comments for the material  
65 identified above in c. and, if they find such material, to remove it;
  - 66 e. Inform members of the public that they may request, during the period  
67 between when a comment is received and when it is made public, that  
68 personal information they inadvertently submitted be withheld;
  - 69 f. Inform members of the public that they may request, after the agency has  
70 published any comment, that personal or confidential commercial information  
71 pertaining to themselves or to their dependents within the comment be  
72 removed from public exposure; and
  - 73 g. Inform members of the public that the agency reserves the right to redact or  
74 aggregate any part of a comment if the agency determines that it constitutes  
75 protected material, or may withhold a comment in its entirety if it determines  
76 that redaction or aggregation would insufficiently prevent the disclosure of  
77 this information.
- 78 3. An agency should include the notifications described in Paragraph 2, or a link to those  
79 notifications, in at least the following places:



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- 80 a. Within the rulemaking document upon which the agency requests comments, such  
81 as a notice of proposed rulemaking or an advanced notice of proposed  
82 rulemaking;
- 83 b. On the agency's own comment submission form, if the agency has one;
- 84 c. Within any automatic emails that an agency sends acknowledging receipt of a  
85 comment;
- 86 d. On any part of the agency's website that describes its rulemaking process; and  
87 e. Within any notices of public meetings pertaining to the rule.
- 88 4. The General Services Administration's eRulemaking Program Management Office  
89 should work with those agencies that participate in Regulations.gov to include the  
90 notifications described in Paragraph 2 within any automated emails that Regulations.gov  
91 sends acknowledging receipt of a comment and on relevant parts of the Regulations.gov  
92 website.

### **Deciding Whether to Offer Assurances of Protection from Disclosure of Confidential Commercial Information**

- 93 5. Agencies that choose to offer assurances of protection from disclosure of confidential  
94 commercial information should decide how they will offer them. Agencies can choose to  
95 inform submitters, directly upon submission, that they will accord confidential  
96 commercial information protected treatment; post a general notice informing submitters  
97 that confidential commercial information will be accorded protected treatment; or both.
- 98 6. Agencies that choose to offer assurances of protection from disclosure of confidential  
99 commercial information should adopt policies to help them identify such information.  
100 Agencies should consider doing the following, either in tandem or as alternatives, as part  
101 of their policies:
- 102 a. Instructing submitters to clearly identify that the document contains  
103 confidential commercial information;
- 104 b. Instructing submitters to flag the particular text within the document that  
105 constitutes confidential commercial information; and



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- 106 c. Instructing submitters to submit both redacted and unredacted versions of a  
107 comment that contains confidential commercial information.
- 108 7. Agencies that choose to offer assurances of protection from disclosure of confidential  
109 commercial information should withhold such material, using the techniques described in  
110 Paragraph 10 below as appropriate.

### **Allowing Submitters to Notify the Agency of Material They Inadvertently Submitted**

- 111 8. If notified by submitters that they inadvertently included personal or confidential  
112 commercial information in their comments, agencies should act as promptly as possible  
113 to determine whether such information warrants protection and if so, protect it from  
114 publication, or, if already disclosed, remove it.

### **Allowing Third Parties to Notify the Agency, After the Agency Publishes the Comment, of Material They Want Removed**

- 115 9. Agencies should allow third parties to request that personal or confidential commercial  
116 information pertaining to themselves or a dependent within a published comment be  
117 removed from public exposure. Agencies should review such requests and, upon  
118 determining that the information subject to the request is, in fact, personal or confidential  
119 commercial information, they should take all steps necessary to so remove it as promptly  
120 as possible.

### **Screening Comments for Personal Information and Protecting Such Material from Disclosure**

- 121 10. Agencies that screen comments for personal information prior to publication in the public  
122 rulemaking docket, either as required by law or as a matter of agency discretion, should:  
123 a. redact the personal information and publish the rest of the comment, if such  
124 information appears infrequently. Redaction should be thorough enough to

**Commented [TR5]:** During the second Committee meeting, Andrew Simons (EPA) noted that it could be a lengthy and complicated process for an agency to identify confidential commercial information and questioned whether it is realistic for agencies to do so. The Committee bracketed this for further discussion at the third Committee meeting.

**Commented [TR6]:** Recommendations 8–9 were modified based on Senior Fellow Neil R. Eisner's comments at the second Committee meeting.



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- 125 prevent a person from discerning the redacted information, but not so broad as to  
126 prevent the public from viewing non-personal material; and
- 127 b. delink the data from the individuals to whom the data belong and present the data  
128 in a summarized form, such as an average (hereinafter “aggregation”), if such  
129 information pertains to large numbers of people. Agencies should work with data  
130 science experts and others in relevant disciplines to ensure that aggregation is  
131 thorough enough to prevent someone from disaggregating the data (i.e., linking  
132 the aggregated data with any person).
- 133 11. If redaction and aggregation would still permit a member of the public to identify the  
134 redacted material, or disaggregate the aggregated material, the agency should withhold  
135 the comment in its entirety, describing the material it has withheld pursuant to Paragraph  
136 13 below.
- 137 12. Agencies should explore using a variety of computer-based tools to aid in their  
138 identification of personal information. This exploration should include speaking with  
139 private sector experts and technology-focused agencies such as the General Services  
140 Administration’s Technology Transformation Service and the Office of Management and  
141 Budget’s United States Digital Service to determine which tools are most appropriate and  
142 how they can be best deployed given the agencies’ resources.

### **Describing Material an Agency Has Withheld**

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

**Commented [TR7]:** Senior Fellow Richard J. Pierce, Jr. suggests, in his published comment (8/18/2020), changing “information . . . on which they have relied” to “information . . . they may have considered.”



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