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

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

\(^1\) 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).

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

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

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

[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. 522(a)(4). Similarly, limiting personally identifiable information such as names and addresses to ‘accidentally’ submitted information (line [23]) suggests a narrower definition.”

I. General obligations to disclose information underlying rules under the Administrative Procedure Act and the D.C. Circuit’s current interpretation thereof;

II. Legal obligations to withhold certain materials under the Privacy Act and the Trade Secrets Act; and

III. Exceptions to the Privacy Act for materials required to be released under FOIA and exceptions to the Trade Secrets Act for materials authorized by law to be disclosed]

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

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

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

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4 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.
2. To reduce the risk that agencies will inadvertently disclose protected material in connection with rulemakings, agencies should clearly notify the public about their treatment of protected material. An agency’s notifications should:

   a. Inform members of the public that comments are generally subject to public disclosure, except when disclosure is limited by law;

   b. Inform members of the public whether the agency offers assurances of protection from disclosure for their confidential commercial information and, if so, how to identify such information for the agency;

   c. Instruct members of the public never to submit unique identification numbers such as social security numbers and other kinds of personal or confidential commercial information that pertain to third parties, such as medical information and trade secrets;

   d. Advise members of the public to review their comments for the material identified above in c. and, if they find such material, to remove it;

   e. Inform members of the public that they may request, during the period between when a comment is received and when it is made public, that personal information they inadvertently submitted be withheld;

   f. Inform members of the public that they may request, after the agency has published any comment, that personal or confidential commercial information pertaining to themselves or to their dependents within the comment be removed from public exposure; and

   g. Inform members of the public that the agency reserves the right to redact or aggregate any part of a comment if the agency determines that it constitutes protected material, or may withhold a comment in its entirety if it determines that redaction or aggregation would insufficiently prevent the disclosure of this information.

3. An agency should include the notifications described in Paragraph 2, or a link to those notifications, in at least the following places:
a. Within the rulemaking document upon which the agency requests comments, such as a notice of proposed rulemaking or an advanced notice of proposed rulemaking; 

b. On the agency’s own comment submission form, if the agency has one; 

c. Within any automatic emails that an agency sends acknowledging receipt of a comment; 

d. On any part of the agency’s website that describes its rulemaking process; and 

e. Within any notices of public meetings pertaining to the rule. 

4. The General Services Administration’s eRulemaking Program Management Office should work with those agencies that participate in Regulations.gov to include the notifications described in Paragraph 2 within any automated emails that Regulations.gov sends acknowledging receipt of a comment and on relevant parts of the Regulations.gov website. 

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

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

6. Agencies that choose to offer assurances of protection from disclosure of confidential commercial information should adopt policies to help them identify such information. Agencies should consider doing the following, either in tandem or as alternatives, as part of their policies: 

a. Instructing submitters to clearly identify that the document contains confidential commercial information; 

b. Instructing submitters to flag the particular text within the document that constitutes confidential commercial information; and
c. Instructing submitters to submit both redacted and unredacted versions of a comment that contains confidential commercial information.

7. Agencies that choose to offer assurances of protection from disclosure of confidential commercial information should withhold such material, using the techniques described in Paragraph 10 below as appropriate.

| Allowing Submitters to Notify the Agency of Material They Inadvertently Submitted |

8. If notified by submitters that they inadvertently included personal or confidential commercial information in their comments, agencies should act as promptly as possible to determine whether such information warrants protection and if so, protect it from 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 |

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

| Screening Comments for Personal Information and Protecting Such Material from Disclosure |

10. Agencies that screen comments for personal information prior to publication in the public rulemaking docket, either as required by law or as a matter of agency discretion, should:

   a. redact the personal information and publish the rest of the comment, if such 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.
prevent a person from discerning the redacted information, but not so broad as to
prevent the public from viewing non-personal material; and

b. delink the data from the individuals to whom the data belong and present the data
in a summarized form, such as an average (hereinafter “aggregation”), if such
information pertains to large numbers of people. Agencies should work with data
science experts and others in relevant disciplines to ensure that aggregation is
thorough enough to prevent someone from disaggregating the data (i.e., linking
the aggregated data with any person).

11. If redaction and aggregation would still permit a member of the public to identify the
redacted material, or disaggregate the aggregated material, the agency should withhold
the comment in its entirety, describing the material it has withheld pursuant to Paragraph
13 below.

12. Agencies should explore using a variety of computer-based tools to aid in their
identification of personal information. This exploration should include speaking with
private sector experts and technology-focused agencies such as the General Services
Administration’s Technology Transformation Service and the Office of Management and
Budget’s United States Digital Service to determine which tools are most appropriate and
how they can be best deployed given the agencies’ resources.

Describing Material an Agency Has Withheld

13. When agencies withhold from public disclosure personal or confidential commercial
information they have received from the public in connection with a rulemaking and on
which they have relied in formulating rules, they should describe the withheld material in
as much detail as possible without compromising its confidentiality. In doing so, agencies
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.”
reports on the parts of their websites that describe their rulemaking processes and within
the preambles to final rules.