Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation for Committee | November 18, 2020

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 public rulemaking dockets.² This project builds on these recommendations.

The scope of the Recommendation is limited to personal information and confidential commercial information that an agency has decided to withhold from its public rulemaking docket, which this Recommendation calls “protected material.” The Recommendation specifies

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¹ The public rulemaking docket is distinguished from “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 means the full record of materials before the agency in an informal rulemaking and includes all materials the agency considered during the course of the rulemaking. See Admin. Conf. of the U.S., Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358 (July 10, 2013).

how agencies should handle protected material, notwithstanding any countervailing benefits of disclosure. For purposes of this Recommendation, personal information is information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other information.\(^3\) Confidential commercial information is commercial information that is customarily kept private, or at least closely held, by the person or business providing it.\(^4\) Other types of 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. It is not intended to define the universe of protected materials.

Agencies accept public comments for their public rulemaking dockets primarily through Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that accept comments expressly notify the public that agencies may publish the information they receive in public comments.\(^5\) When a person submits a comment to an agency, however, the agency typically does not immediately publish the comment. Instead, agencies generally take time to review comments before publishing them. Most agencies perform at least some kind of screening during this period.

For all agencies, whether to withhold or disclose protected material is governed by various laws: some mandate disclosure, some mandate withholding, and some leave agencies with substantial discretion in deciding whether to disclose. Although a full description of those

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laws is beyond the scope of this Recommendation, a brief overview of at least some of this body of law helps to identify issues at hand.

The Administrative Procedure Act requires agencies to “give interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments.”6 The United States Court of Appeals for the D.C. Circuit has interpreted this provision to require ordinarily that agencies make publicly available the critical information—including studies, data, and methodologies—underlying proposed rules.7

The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed above. Generally, the Privacy Act prevents agencies from disclosing any information about a person, such as medical records, educational background, and employment history, contained in an agency’s system of records without that person’s written consent.8 The Trade Secrets Act generally prevents agencies from disclosing trade secrets and other kinds of confidential commercial information, such as corporate losses and profits.9

Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the only exception relevant to this Recommendation is for information required to be released under the Freedom of Information Act (FOIA).10 The Trade Secrets Act only has one exception, which covers any materials authorized to be disclosed by statute (including FOIA) or regulation.11 Whether a particular piece of personal or confidential commercial information meets one of the exceptions often involves a complex determination that depends upon the exact type of

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6 5 U.S.C. § 553(c).
8 5 U.S.C. § 552a(b).
10 5 U.S.C. § 552a(b)(2).
information at issue and its contemplated use, and agencies must determine the applicability of
the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of
confidential commercial information may turn in part on whether the agency in receipt of the
information assured the submitter that the information would be withheld from the public.12 If an
agency offers assurances that it will not disclose confidential commercial information, the
agency and the submitter may rely on those assurances as a defense against compelled disclosure
under FOIA. In many cases, agencies assure companies that they will not disclose such
information in order to encourage companies to submit it. 

Either by law or as a matter of discretion, agencies often consider certain types of
personal information and confidential commercial information to be protected material (e.g.,
trade secrets, social security numbers, bank account numbers, passport numbers, addresses, email
addresses, medical information, and information concerning a person’s finances), though
particular cases are governed by specific requirements of law, not broad categorical labels.

There are many ways such protected material may arrive at the agency in a rulemaking. A
person might submit his or her own information, intentionally or unintentionally, and then ask
the agency not to disclose it. A third party might submit another person’s information, with or
without that person’s knowledge. A company might submit a document containing its own
confidential commercial information, intentionally or unintentionally, with or without the
agency’s prior assurance of protection. Or a company might submit another company’s or
person’s information. Depending on the information in question, and the manner in which it was
submitted, there may be issues of waiver of statutory protection. Such questions, like all

questions regarding the substance of the laws governing protected material, are beyond this

12 See Food Mktg. Inst., 139 S. Ct. at 2361.
Recommendation’s scope, but they illustrate the various considerations that agencies and the public often face in the submission and handling of such material.

This Recommendation prescribes steps agencies can take to withhold protected materials from their public rulemaking dockets while still providing the public with the information upon which agencies relied in formulating a proposed rule.\footnote{Permitting the submission of anonymous and pseudonymous comments is one way that some agencies attempt to reduce the privacy risks that commenters face when submitting protected material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing project of the Administrative Conference titled Mass, Computer-Generated, and Fraudulent Comments and are beyond the scope of this Recommendation.}

**RECOMMENDATION**

**Recommendations for All Agencies**

1. To reduce the risk that agencies will inadvertently disclose personal or confidential commercial information they determine should be withheld from the public rulemaking docket (hereinafter “protected material”), agencies should develop written policies that specify exactly what kinds of personal and confidential commercial information qualify as “protected material” and 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;

\textit{Commented [TR5]: Note for the Committee: These paragraphs, which describe examples of protected material, replace a previous description of examples that the Committee instructed us to extensively revise.}

\textit{Commented [TR6]: Note for the Committee: This paragraph originally read: "Agencies should decide whether to withhold protected personal information or confidential commercial information (hereinafter ‘protected material’) from public rulemaking dockets, notwithstanding any countervailing public benefits of disclosure." ACUS staff revised this because the original wording implies that agencies have a choice as to whether to withhold protected material whereas in many instances, the outcome may be prescribed by law. Additionally, the revised version introduces the notion of agencies’ establishing written policies, which was an implicit assumption underlying subsequent numbered paragraphs and is now explicit.}
c. Instruct members of the public never to submit unique identification numbers such as social security numbers and other kinds of protected material 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 protected material they inadvertently submitted be withheld from the public rulemaking docket;

f. Inform members of the public that they may request, after the agency has published any comment, that protected material pertaining to themselves or to their dependents within the comment be removed from the public rulemaking docket; 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 material.

2. An agency should include the written policies and notifications described in Paragraph 1, or a link to those written policies and notifications, in at least the following places:

   a. Within the rulemaking document on which the agency requests comments, such as a notice of proposed rulemaking or an advance 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; and

   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.

3. The General Services Administration’s eRulemaking Program Management Office should work with agencies that participate in Regulations.gov to include or refer to the

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written policies and notifications described in Paragraph 1 within any automated emails Regulations.gov sends acknowledging receipt of a comment.

4. If a submitter notifies an agency that the submitter inadvertently included protected material in the submitter’s comment, the agency should act as promptly as possible to determine whether such material warrants withholding from the public rulemaking docket and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove it from the public rulemaking docket.

5. Agencies should allow third parties to request that protected material pertaining to themselves or a dependent be removed from the public rulemaking docket. Agencies should review such requests and, upon determining that the material subject to the request qualifies as protected material, should remove it from the public rulemaking docket as promptly as possible.

Recommendations for Agencies That Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket

6. Agencies that screen comments for protected material before publication in the public rulemaking docket, either as required by law or as a matter of agency discretion, should redact the protected material, if appropriate, and publish the rest of the comment, if such material appears infrequently. Redaction should be thorough enough to prevent a person from discerning the redacted material, but not so broad as to prevent the public from viewing non-protected material.

7. If redaction is not feasible due to the high volume of protected material within a comment, agencies should consider presenting the data in a summarized form, such as an average (hereinafter “aggregation”). 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., relinking the aggregated data with the people to whom such data belong).

Commented [TR10]: Note for the Committee: This, and all other uses of the term “protected material” within this section, initially read “personal information.” Christopher Yoo’s research revealed that some agencies do screen comments for confidential commercial information (even though, as his report notes, screening for such information may be unnecessary) and the Acting Committee Chair believes that paragraphs 6–9 apply with equal force to such agencies. Framing this recommendation broadly to cover all protected material will avoid the appearance of implying that this is not also an issue for confidential commercial information.

Commented [TR11]: Note for the Committee: No substantive changes were made to this paragraph, but the Committee may wish to consider whether the more likely scenario is an agency’s aggregating multiple comments (rather than data contained within a single comment) and, if so, whether to rephrase this paragraph.
8. If redaction and aggregation would still permit a member of the public to identify protected material, agencies should withhold the comment in its entirety. When doing so, they should describe the withheld material for the public in as much detail as possible without compromising its confidentiality. Agencies should include such descriptions within the preambles to pertinent final rules. Agencies should also include, on the parts of their websites that describe their rulemaking processes, their general policy, if any, with respect to preparing such descriptions and their policies with respect to redacting, aggregating, and withholding protected material.

9. When deciding whether and how to redact, aggregate, or withhold protected material, agencies should explore using a variety of artificial intelligence-based tools to aid in identifying protected material. Agencies should speak 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 best be deployed given the agencies’ resources.

Recommendations for Agencies That Offer Assurances of Protection from Disclosure of Confidential Commercial Information

10. Agencies that offer assurances of protection from disclosure of confidential commercial information should decide how they will offer such assurances. Agencies can choose to inform submitters, directly upon submission, that they will withhold confidential commercial information from the public rulemaking docket; post a general notice informing submitters that confidential commercial information will be withheld from the public rulemaking docket; or both.

11. Such agencies should adopt policies to help them identify such information. Agencies should include the following, either in tandem or as alternatives, as part of their policies:

Commented [TR12]: Note for the Committee: This originally read “agencies should consider preparing explanatory staff or technical reports and should publish these reports on the parts of their websites that describe their rulemakings processes and within the preambles to final rules.” The ACUS staff changed this because the terms “explanatory staff or technical reports” are not clear and the revised language captures what seems to have been the Committee’s intent here.
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.