



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Protected Materials in Public Rulemaking Dockets

### Committee on Rulemaking

Proposed Recommendation for Committee | ~~August 31~~November 18, 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>

6 The Administrative Conference has issued several recommendations to help agencies  
7 balance the competing considerations of transparency and confidentiality in managing their  
8 public rulemaking dockets.<sup>2</sup> This project builds on these recommendations. ~~It specifies how~~

---

<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~~means the public full record of materials before the agency in an informal rulemaking ~~docket~~ and ~~the administrative record for judicial review combined~~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).

<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,



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

9 ~~agencies should handle rulemaking materials they determine should be withheld to protect~~  
10 ~~personal and confidential commercial information (hereinafter “protected material”);~~  
11 ~~notwithstanding any countervailing benefits of disclosure.~~

12 The scope of the Recommendation is ~~explicitly~~ limited to ~~protecting~~ personal information  
13 and confidential commercial information— that an agency has decided to withhold from its public  
14 rulemaking docket, which this Recommendation calls “protected material.” The  
15 Recommendation specifies how agencies should handle protected material, notwithstanding any  
16 countervailing benefits of disclosure. For purposes of this Recommendation, personal  
17 information is information that can be used to distinguish or trace an individual’s identity, either  
18 alone or when combined with other information.<sup>3</sup> Confidential commercial information is  
19 commercial information that is customarily kept private, or at least closely held, by the person or  
20 business providing it.<sup>4</sup> Other types of ~~protected~~ information, such as national security  
21 information and copyrighted materials, are beyond the Recommendation’s scope. The  
22 Recommendation is also limited to addressing procedures for protecting materials that agencies

---

76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, *the Administrative Record in Informal Rulemaking* *supra* note 1, ¶ 11, 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).

<sup>3</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, *MANAGING INFORMATION AS A STRATEGIC RESOURCE* § 10 (37) (2016).

<sup>4</sup> See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

23 decide warrant protection. ~~The Recommendation~~It is not intended to ~~offer suggestions on what is~~  
24 ~~or is not~~ define the universe of protected ~~material~~-materials.

25 ~~Though not intended as an exhaustive list, the following types of information typically~~  
26 ~~qualify as “protected materials” in most agencies. One category of protected materials covers~~  
27 ~~unique identification numbers, either of submitters themselves or of third parties, that create a~~  
28 ~~high risk of identity theft if disclosed. This category includes social security numbers, bank~~  
29 ~~account numbers, and passport numbers. Another category consists of two kinds of personal~~  
30 ~~information: information about the submitter submitted to the agency accidentally, and~~  
31 ~~information pertaining to someone other than the submitter. Information within this category~~  
32 ~~includes names, email addresses, physical addresses, medical information, and so on. A third~~  
33 ~~category consists of confidential commercial information provided to the agency under an~~  
34 ~~assurance of protection from disclosure. Currently, agencies~~ Agencies accept public comments  
35 for their public rulemaking dockets primarily through Regulations.gov ~~and~~, their own websites,  
36 and email. Regulations.gov and many agency websites that accept comments expressly notify the  
37 public that ~~the agency~~agencies may publish the information ~~it receives~~they receive in public  
38 comments.<sup>5</sup> When a person submits a comment to an agency, however, the agency typically does  
39 not immediately publish the comment. Instead, ~~the agency takes~~agencies generally take time to  
40 review comments before publishing them. Most agencies perform at least some kind of screening  
41 during this period.

---

<sup>5</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>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

- 43 ~~I. General obligations to disclose information underlying rules under the Administrative~~  
44 ~~Procedure Act and the D.C. Circuit’s current interpretation thereof;~~  
45 ~~II. Legal obligations to withhold certain materials under the Privacy Act and the Trade~~  
46 ~~Secrets Act; and~~  
47 ~~III. Exceptions to the Privacy Act for materials required to be released under FOIA and~~  
48 ~~exceptions to the Trade Secrets Act for materials authorized by law to be disclosed]~~

49 For all agencies, whether to withhold or disclose protected material is governed by  
50 various laws: some mandate disclosure, some mandate withholding, and some leave agencies  
51 with substantial discretion in deciding whether to disclose. Although a full description of those  
52 laws is beyond the scope of this Recommendation, a brief overview of at least some of this body  
53 of law helps to identify issues at hand.

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

---

<sup>6</sup> 5 U.S.C. § 553(c).

<sup>7</sup> See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

65        Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the  
66 only exception relevant to this Recommendation is for information required to be released under  
67 the Freedom of Information Act (FOIA).<sup>10</sup> The Trade Secrets Act only has one exception, which  
68 covers any materials authorized to be disclosed by statute (including FOIA) or regulation.<sup>11</sup>  
69 Whether a particular piece of personal or confidential commercial information meets one of the  
70 exceptions often involves a complex determination that depends upon the exact type of  
71 information at issue and its contemplated use, and agencies must determine the applicability of  
72 the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of  
73 confidential commercial information may turn in part on whether the agency in receipt of the  
74 information assured the submitter that the information would be withheld from the public.<sup>12</sup> If an  
75 agency offers assurances that it will not disclose confidential commercial information, the

---

<sup>8</sup> 5 U.S.C. § 552a(b).

<sup>9</sup> 18 U.S.C. § 1905.

<sup>10</sup> 5 U.S.C. § 552a(b)(2).

<sup>11</sup> See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).

<sup>12</sup> See *Food Mktg. Inst.*, 139 S. Ct. at 2361.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

76 agency and the submitter may rely on those assurances as a defense against compelled disclosure  
77 under FOIA. In many cases, agencies assure companies that they will not disclose such  
78 information in order to encourage companies to submit it.

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

84 There are many ways such protected material may arrive at the agency in a rulemaking. A  
85 person might submit his or her own information, intentionally or unintentionally, and then ask  
86 the agency not to disclose it. A third party might submit another person's information, with or  
87 without that person's knowledge. A company might submit a document containing its own  
88 confidential commercial information, intentionally or unintentionally, with or without the  
89 agency's prior assurance of protection. Or a company might submit another company's or  
90 person's information. Depending on the information in question, and the manner in which it was  
91 submitted, there may be issues of waiver of statutory protection. Such questions, like all  
92 questions regarding the substance of the laws governing protected material, are beyond this  
93 Recommendation's scope, but they illustrate the various considerations that agencies and the  
94 public often face in the submission and handling of such material.

95 This Recommendation prescribes steps agencies can take to ~~exclude~~withhold protected  
96 materials from their public rulemaking dockets ~~protected material~~ while still providing the public



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

97 with the information upon which agencies relied in formulating ~~thea~~ proposed rule.<sup>13</sup> ~~These steps~~  
98 ~~include, among others, aggregating the data, which means delinking the data from the individuals~~  
99 ~~to whom the data belong and then presenting the data in a summarized form, such as a median.~~  
100 ~~The Recommendation also identifies resources that can help agencies implement the principle of~~  
101 ~~excluding from their public rulemaking dockets protected material while still providing the~~  
102 ~~public with the information upon which the agency relied in formulating the proposed rule.~~

## RECOMMENDATION

### Recommendations for All Agencies

- 103  
104 1. ~~Agencies should decide whether to withhold protected personal information or~~  
105 ~~confidential commercial information (hereinafter “protected material”) from public~~  
106 ~~rulemaking dockets, notwithstanding any countervailing public benefits of disclosure. To~~  
107 ~~reduce the risk that agencies will inadvertently disclose personal or confidential~~  
108 ~~commercial information they determine should be withheld from the public rulemaking~~  
109 ~~docket (hereinafter “protected material”), agencies should develop written policies that~~  
110 ~~specify exactly what kinds of personal and confidential commercial information qualify~~  
111 ~~as “protected material” and should clearly notify the public about their treatment of~~  
112 ~~protected material.~~

---

<sup>13</sup> ~~Although~~ Permitting the submission of anonymous and pseudonymous comments ~~may serve~~ is one way that some  
agencies attempt to protect ~~reduce the privacy risks that commenters face when submitting protected information,~~  
~~issues~~ material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in  
an ongoing ACUS project of the Administrative Conference titled “Mass, Computer-Generated, and Fraudulent  
Comments”<sup>22</sup> and are beyond the scope of this Recommendation.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 113 2.1.An agency's notifications should:
- 114 a. Inform members of the public that comments are generally subject to public
- 115 disclosure, except when disclosure is limited by law;
- 116 b. Inform members of the public whether the agency offers assurances of
- 117 protection from disclosure for their confidential commercial information and
- 118 if so, how to identify such information for the agency;
- 119 c. Instruct members of the public never to submit unique identification numbers
- 120 such as social security numbers and other kinds of ~~personal or confidential~~
- 121 ~~commercial information-protected material~~ that pertain to third parties, such as
- 122 medical information and trade secrets;
- 123 d. Advise members of the public to review their comments for the material
- 124 identified above in (c); and, if they find such material, to remove it;
- 125 e. Inform members of the public that they may request, during the period
- 126 between when a comment is received and when it is made public, that
- 127 ~~personal information-protected material~~ they inadvertently submitted be
- 128 withheld;
- 129 f. Inform members of the public that they may request, after the agency has
- 130 published any comment, that ~~personal or confidential commercial~~
- 131 ~~information-protected~~ ~~pertaining material pertaining~~ to themselves or to their
- 132 dependents within the comment be removed ~~from public exposure~~ from the
- 133 public rulemaking docket; and
- 134 g. Inform members of the public that the agency reserves the right to redact or
- 135 aggregate any part of a comment if the agency determines that it constitutes
- 136 protected material, or may withhold a comment in its entirety if it determines





ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

137 that redaction or aggregation would insufficiently prevent the disclosure of  
138 ~~this information~~this material.

139 ~~3.2.~~An agency should include the written policies and notifications described in Paragraph  
140 12, or a link to those written policies and notifications, in at least the following places:

- 141 a. Within the rulemaking document upon which the agency requests comments, such  
142 as a notice of proposed rulemaking or an advanced notice of proposed  
143 rulemaking;
- 144 b. On the agency's own comment submission form, if the agency has one;
- 145 c. Within any automatic emails that an agency sends acknowledging receipt of a  
146 comment;
- 147 d. On any part of the agency's website that describes its rulemaking process; and
- 148 e. Within any notices of public meetings pertaining to the rule.

149 ~~4.3.~~The General Services Administration's eRulemaking Program Management Office  
150 should work with agencies that participate in Regulations.gov to include or refer to the  
151 notifications described in Paragraph 12 within any automated emails Regulations.gov  
152 sends acknowledging receipt of a comment.

153 ~~5.4.~~If ~~notified by submitters~~ a submitter notifies an agency that they submitter inadvertently  
154 included ~~personal or confidential commercial information-protected material~~ in their  
155 submitter's comments, the agencies should act as promptly as possible to determine  
156 whether such ~~information~~material warrants ~~protection~~withholding from the public  
157 rulemaking docket and if so, ~~protect it from publication~~withhold it from the public  
158 rulemaking docket, or, if already disclosed, remove it from the public rulemaking docket.

159 5. Agencies should allow third parties to request that ~~personal or confidential commercial~~  
160 ~~information-protected material~~ pertaining to themselves or a dependent ~~within a~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

161 ~~published comment~~ be removed from ~~the public exposure~~ rulemaking docket. Agencies  
162 should review such requests and, upon determining that the ~~information~~ material subject  
163 to the ~~request is, in fact, personal or confidential commercial information~~ request qualifies  
164 as protected material, they should ~~take all steps necessary to so~~ remove it from the public  
165 rulemaking docket as promptly as possible.

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

- 168 6. Agencies that screen comments for ~~personal information~~ protected material ~~prior to~~ before  
169 publication in the public rulemaking docket, either as required by law or as a matter of  
170 agency discretion, should redact the ~~personal information~~ protected material, if  
171 ~~and appropriate, and~~ publish the rest of the comment, if such ~~information~~ material appears  
172 infrequently. Redaction should be thorough enough to prevent a person from discerning  
173 the redacted ~~information~~ material, but not so broad as to prevent the public from viewing  
174 non-~~personal~~ protected material.
- 175 7. If redaction is not feasible due to the high volume of protected material within a  
176 comment, agencies should delink the data from the individuals to whom the data belong  
177 and consider presenting the data in a summarized form, such as an average (hereinafter  
178 “aggregation”); ~~if such information pertains to large numbers of people.~~ Agencies should  
179 work with data science experts and others in relevant disciplines to ensure that  
180 aggregation is thorough enough to prevent someone from disaggregating the data (i.e.,  
181 relinking the aggregated data with any person the people to whom such data belong).
- 182 8. If redaction and aggregation would still permit a member of the public to identify ~~the~~  
183 ~~redacted protected material, or disaggregate the aggregated material,~~ the agencies ~~sy~~ should  
184 withhold the comment in its entirety. When ~~agencies withhold from public disclosure~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

185 ~~personal or confidential commercial information they have received from the public in~~  
186 ~~connection with a rulemaking and may have considered in formulating the rule, doing so,~~  
187 they should describe the withheld material for the public in as much detail as possible  
188 without compromising its confidentiality. ~~In doing so, agencies should consider preparing~~  
189 ~~explanatory staff or technical reports and should publish these reports on the parts of their~~  
190 ~~websites that describe their rulemaking processes and~~ Agencies should include such  
191 descriptions within the preambles to final rules. Agencies should also include, on the  
192 parts of their websites that describe their rulemaking processes, their general policy, if  
193 any, with respect to preparing such descriptions and their policies with respect to  
194 redacting, aggregating, and withholding protected material.

195 9. When deciding whether and how to redact, aggregate, or withhold protected material,

196 aAgencies should explore using a variety of ~~computer~~artificial intelligence-based tools to  
197 aid ~~in their identification of personal information in identifying protected material.~~ This  
198 exploration should include ~~Agencies speak~~should speaking with private sector experts  
199 and technology-focused agencies such as the General Services Administration's  
200 Technology Transformation Service and the Office of Management and Budget's United  
201 States Digital Service to determine which tools are most appropriate and how they can be  
202 best deployed given the agencies' resources.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

---

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

205 ~~9.10.~~ Agencies that ~~choose to~~ offer assurances of protection from disclosure of  
206 confidential commercial information should decide how they will offer ~~them~~such  
207 assurances. Agencies can choose to inform submitters, directly upon submission, that  
208 they will ~~accord~~withhold confidential commercial information ~~protected treatment from~~  
209 the public rulemaking docket; post a general notice informing submitters that confidential  
210 commercial information will be ~~accorded protected treatment~~withheld from the public  
211 rulemaking docket; or both.

212 ~~10.11.~~ ~~Agencies that choose to offer assurances of protection from disclosure of~~  
213 ~~confidential commercial information~~ Such agencies should adopt policies to help them  
214 identify such information. Agencies should ~~consider doing the~~include the following,  
215 either in tandem or as alternatives, as part of their policies:

- 216 a. Instructing submitters to clearly identify that the document ~~contains~~  
217 confidentialcontains confidential commercial information;
- 218 b. Instructing submitters to flag the particular text within the document that  
219 constitutes confidential commercial information; and
- 220 c. Instructing submitters to submit both redacted and unredacted versions of a  
221 comment that contains confidential commercial information.