



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation | December 16, 2020

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

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.¹

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.² This project builds on these recommendations.

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 all comments and materials submitted to the agency during comment periods and any other 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).

² 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, *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. *See also* Admin. Conf. of the U.S.,



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9 The scope of the Recommendation is limited to personal information and confidential
10 commercial information that an agency has decided to withhold from its public rulemaking
11 docket, which this Recommendation calls “protected material.” The Recommendation specifies
12 how agencies should consider handling protected material. For purposes of this
13 Recommendation, personal information is ~~information that can be used to distinguish or trace an~~
14 ~~individual’s identity, either alone or when combined with other information.~~³ ~~information about~~
15 ~~an individual that is maintained by an agency, including his or her education, financial~~
16 ~~transactions, medical history, and criminal or employment history, and that contains his or her~~
17 ~~name, or the identifying number, symbol, or other identifying particular assigned to~~
18 ~~the individual.~~⁴ Confidential commercial information is commercial information that is
19 customarily kept private, or at least closely held, by the person or business providing it.⁵ Other
20 types of information, such as national security information and copyrighted materials, are beyond
21 the Recommendation’s scope. The Recommendation is also limited to addressing procedures for
22 protecting materials that agencies decide warrant protection. It is not intended to define the
23 universe of protected materials. ~~In particular, this Recommendation does not address any issue~~
24 ~~that may arise if an agency desires to rely on protected material in its rulemaking explanation.~~

25 Agencies accept public comments for their public rulemaking dockets primarily through
26 Regulations.gov, their own websites, and email. Regulations.gov and many agency websites that
27 accept comments expressly notify the public that agencies may publish the information

Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); [Admin. Conf. of the U.S., Recommendation 82-1, Exemption \(b\)\(4\) of the Freedom of Information Act](#), 47 Fed. Reg. 30,702 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).

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

⁴ See Privacy Act of 1974 § 3, 5 U.S.C. § 552a(a)(4).

⁵ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). See also *Exec. Order No. 12,600, Predisclosure Notification Procedures for Confidential Commercial Information*, 52 Fed. Reg. 23,781 (June 23, 1987).

Commented [CA1]: Proposed Amendment from Council. Explanation: This change aligns the definition of “personal information” with the definition of “record” in the Privacy Act (see parallel amendment at lines 83-88 below).

Note from Administrative Conference Staff: Public Member Jack M. Beermann has proposed the following revision, which may be rendered moot if the Council Amendment is adopted:

“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, and information that an individual would ordinarily keep private, such as bank account numbers, passport numbers, addresses, email addresses, medical information, and information concerning a person’s finances.”

Commented [CMA2]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 1 (change appears in footnote 5)

Commented [CMA3]: Proposed Amendment from Public Member Jack M. Beermann



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28 submitted in public comments.⁶ When a person submits a comment to an agency, however, the
29 agency typically does not immediately publish the comment. Instead, the agency generally takes
30 time to screen comments before publishing them. Most agencies perform at least some kind of
31 screening during this period.

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

37 The Administrative Procedure Act requires agencies to “give interested persons an
38 opportunity to participate in rulemaking through submission of written data, views, or
39 arguments.”⁷ The United States Court of Appeals for the D.C. Circuit has interpreted this
40 provision to ordinarily require that agencies make publicly available the critical information—
41 including studies, data, and methodologies—underlying proposed rules.⁸

42 The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed
43 above. Generally, the Privacy Act prevents agencies from disclosing any information about a
44 person, such as medical records, educational background, and employment history, contained in
45 an agency’s system of records, without that person’s written consent.⁹ The Trade Secrets Act

⁶ 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>.

⁷ 5 U.S.C. § 553(c).

⁸ See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). In addition to these public transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware. See, e.g., 44 U.S.C. § 3301.

⁹ 5 U.S.C. § 552a(b).



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46 generally prevents agencies from disclosing trade secrets and other kinds of confidential
47 commercial information, such as corporate losses and profits.¹⁰

48 Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the
49 main exception relevant to this Recommendation is for information required to be released under
50 the Freedom of Information Act (FOIA).¹¹ The Trade Secrets Act only has one exception, which
51 covers any materials authorized to be disclosed by statute (including FOIA) or regulation.¹²
52 Whether a particular piece of personal or confidential commercial information meets one of
53 **these** exceptions often involves a complex determination that depends upon the exact type of
54 information at issue and its contemplated use, and agencies must determine the applicability of
55 the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of
56 confidential commercial information may turn in part on whether the agency in receipt of the
57 information assured the submitter that the information would be withheld from the public.¹³ If an
58 agency offers assurances that it will not disclose confidential commercial information, the
59 agency and the submitter may rely on those assurances as a defense against compelled disclosure
60 under FOIA. In many cases, agencies assure companies that they will not disclose such
61 information in order to encourage companies to submit it.

62 Particular cases are governed by specific requirements of law, not broad categorical
63 labels. But generally, agencies often consider certain types of personal information and
64 confidential commercial information to be protected material (e.g., trade secrets, social security
65 numbers, bank account numbers, passport numbers, addresses, email addresses, medical
66 information, and information concerning a person's finances).

¹⁰ 18 U.S.C. § 1905.

¹¹ 5 U.S.C. § 552a(b)(2).

¹² See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).

¹³ See *Food Mktg. Inst.*, 139 S. Ct. at 2361.



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

78 This Recommendation proposes steps agencies can take to withhold protected materials
79 from their public rulemaking dockets while still providing the public with the information upon
80 which agencies relied in formulating a proposed rule.¹⁴

RECOMMENDATION

Recommendations for All Agencies

- 81 1. For purposes of this Recommendation, "protected material" is personal information or
82 confidential commercial information that agencies determine should be withheld from the
83 public rulemaking docket. "Personal information" is ~~information that can be used to~~
84 ~~distinguish or trace an individual's identity, either alone or when combined with other~~
85 ~~information-information about an individual that is maintained by an agency, including~~
86 ~~his or her education, financial transactions, medical history, and criminal or employment~~

Commented [CA4]: Comment from Vice Chairman Matthew L. Wiener: Inclusion of definitions in numbered paragraphs is inconsistent with conventions of the Administrative Conference. Does the Assembly wish to strike the definitions?

¹⁴ 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.



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87 ~~history, and that contains his or her name, or the identifying number, symbol, or other~~
88 ~~identifying particular assigned to the individual.~~ "Confidential commercial information"
89 is commercial information that is customarily kept private, or at least closely held, by the
90 person or business providing it. To reduce the risk that agencies will inadvertently
91 disclose protected material, agencies ~~should describe what kinds of personal and~~
92 ~~confidential commercial information qualify as protected material and~~ should clearly
93 notify the public about their treatment of protected material. An agency's notifications
94 should:
95 a. Inform members of the public that comments are generally subject to public
96 disclosure, except when disclosure is limited by law;
97 b. Inform members of the public whether the agency offers assurances of protection
98 from disclosure for their confidential commercial information and, if so, how to
99 identify such information for the agency;
100 c. Instruct members of the public never to submit protected material that pertains to
101 third parties;
102 d. Advise members of the public to review their comments for the material identified
103 above in (c) and, if they find such material, to remove it;
104 e. Inform members of the public that they may request, during the period between
105 when a comment is received and when it is made public, that protected material
106 they inadvertently submitted be withheld from the public rulemaking docket;
107 f. Inform members of the public that they may request, after the agency has
108 published any comment, that protected material pertaining to themselves or to
109 their dependents within the comment be removed from the public rulemaking
110 docket; and
111 g. Inform members of the public that the agency reserves the right to redact or
112 aggregate any part of a comment if the agency determines that it constitutes
113 protected material, or may withhold a comment in its entirety if it determines that

Commented [CA5]: Proposed Amendment from Council (see parallel amendment and explanation at lines 13-18 above)

Commented [CMA6]: Proposed Amendment from Government Member James L. Anderson # 1



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- 114 redaction or aggregation would insufficiently prevent the disclosure of this
115 material.
- 116 2. An agency should include the notifications described in Paragraph 1, or a link to those
117 notifications, in at least the following places:
- 118 a. Within the rulemaking document on which the agency requests comments, such
119 as a notice of proposed rulemaking or an advance notice of proposed rulemaking;
 - 120 b. On the agency’s own comment submission form, if the agency has one;
 - 121 c. Within any automatic emails that an agency sends acknowledging receipt of a
122 comment;
 - 123 d. On any part of the agency’s website that describes its rulemaking process or
124 within any rule on rulemakings it may have, as described in Recommendation
125 2020-1, Rules on Rulemakings; and
 - 126 e. Within any notices of public meetings pertaining to the rule.
- 127 3. The General Services Administration’s eRulemaking Program Management Office
128 should work with agencies that participate in Regulations.gov to include or refer to the
129 notifications described in Paragraph 1 within any automated emails Regulations.gov
130 sends acknowledging receipt of a comment.
- 131 4. If a submitter notifies an agency that the submitter inadvertently included protected
132 material in the submitter’s comment, the agency should act as promptly as possible to
133 determine whether such material warrants withholding from the public rulemaking docket
134 and, if so, withhold it from the public rulemaking docket, or, if already disclosed, remove
135 it from the public rulemaking docket. If agencies determine that such material does not
136 qualify as protected, they should promptly notify the submitter of this finding with a brief
137 statement of reasons.
- 138 5. Agencies should allow third parties to request that protected material pertaining to
139 themselves or a dependent be removed from the public rulemaking docket. Agencies
140 should review such requests and, upon determining that the material subject to the request
141 qualifies as protected material, should remove it from the public rulemaking docket as

Commented [CMA7]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 2 (see paragraph 12 below for parallel amendment)

Commented [CMA8]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 3 (see paragraph 5 below for parallel amendment)



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142 promptly as possible. If agencies determine that the material does not qualify as
143 protected, they should promptly notify the submitter of this finding with a brief statement
144 of reasons.

Commented [CMA9]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 3 (see paragraph 4 above for parallel amendment)

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

- 145 6. Agencies that screen comments for protected material before publication in the public
146 rulemaking docket, either as required by law or as a matter of discretion, should redact
147 the protected material and publish the rest of the comment. Redaction should be thorough
148 enough to prevent the public from discerning the redacted material, but not so broad as to
149 prevent the public from viewing non-protected material. In addition, all redactions made
150 pursuant to the Freedom of Information Act should include citations to the specific
151 exemptions being applied.
- 152 7. If redaction is not feasible within a comment, agencies should consider presenting the
153 data in a summarized form.
- 154 8. If redaction is not feasible across multiple, similar comments, agencies should consider
155 presenting any related information in an aggregated form. Agencies should work with
156 data science experts and others in relevant disciplines to ensure that aggregation is
157 thorough enough to prevent someone from disaggregating the information.
- 158 9. If the approaches identified in Paragraphs 6–8 would still permit a member of the public
159 to identify protected material, agencies should withhold the comment in its entirety.
160 When doing so, they should describe the withheld material for the public in as much
161 detail as possible without compromising its confidentiality.
- 162 10. When deciding whether and how to redact, aggregate, or withhold protected material,
163 agencies should explore using artificial intelligence-based tools to aid in identifying
164 protected material. Agencies should speakconsult with private sector experts and
165 technology-focused agencies, such as the General Services Administration’s Technology
166 Transformation Service and the Office of Management and Budget’s United States

Commented [CMA10]: Proposed Amendment from Government Member James L. Anderson # 2



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167 Digital Service, to determine which tools are most appropriate and how they can best be
168 deployed given the agencies' resources.

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

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

175 12. Such agencies should adopt policies to help them identify such information. Agencies
176 should consider including the following, either in tandem or as alternatives, as part of
177 their policies, including within any rules on rulemakings they may have, as described in

Recommendation 2020-1, Rules on Rulemakings:

- 178 a. Instructing submitters to **clearly identify clearly** that the document contains
179 confidential commercial information;
- 180 b. Instructing submitters to flag the particular text within the document that
181 constitutes confidential commercial information; and
- 182 c. Instructing submitters to submit both redacted and unredacted versions of a
183 comment that contains confidential commercial information.
184

Commented [CMA11]: Proposed Amendment from Special Counsel Jeffrey S. Lubbers # 2 (see paragraph 2(d) above for parallel amendment)