 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).

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.


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.,
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 how agencies should consider handling protected material. 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, information about an individual that is maintained by an agency, including his or her education, financial transactions, medical history, and criminal or employment history, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual. Confidential commercial information is commercial information that is customarily kept private, or at least closely held, by the person or business providing it. 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. In particular, this Recommendation does not address any issue that may arise if an agency desires to rely on protected material in its rulemaking explanation.

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.

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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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*See Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-130, Managing Information as a Strategic Resource § 10.32(a)(2) (2016).*

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

submitted in public comments. When a person submits a comment to an agency, however, the agency typically does not immediately publish the comment. Instead, the agency generally takes time to screen 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 laws is beyond the scope of this Recommendation, a brief overview of at least some of this body of law helps to identify the issues agencies face.

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

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. The Trade Secrets Act

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7 5 U.S.C. § 553(c).
8 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).
generally prevents agencies from disclosing trade secrets and other kinds of confidential
commercial information, such as corporate losses and profits.\textsuperscript{10}

Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the
main exception relevant to this Recommendation is for information required to be released under
the Freedom of Information Act (FOIA).\textsuperscript{11} The Trade Secrets Act only has one exception, which
covers any materials authorized to be disclosed by statute (including FOIA) or regulation.\textsuperscript{12}
Whether a particular piece of personal or confidential commercial information meets one of
these exceptions often involves a complex determination that depends upon the exact type of
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.\textsuperscript{13} 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.

Particular cases are governed by specific requirements of law, not broad categorical
labels. But generally, 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).

\textsuperscript{10} 18 U.S.C. § 1905.
\textsuperscript{11} 5 U.S.C. § 552a(b)(2).
\textsuperscript{12} See CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1137–43 (D.C. Cir. 1987).
\textsuperscript{13} See Food Mkts. Inst., 139 S. Ct. at 2361.
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 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 proposes 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.14

RECOMMENDATION

Recommendations for All Agencies

1. For purposes of this Recommendation, “protected material” is personal information or confidential commercial information that agencies determine should be withheld from the public rulemaking docket. “Personal information” is information that can be used to distinguish or trace an individual’s identity, either alone or when combined with other information about an individual that is maintained by an agency, including 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?

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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.
history, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual. “Confidential commercial information” is commercial information that is customarily kept private, or at least closely held, by the person or business providing it. To reduce the risk that agencies will inadvertently disclose protected material, agencies should describe 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;

c. Instruct members of the public never to submit protected material that pertains to third parties;

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

Commented [CAS]: 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
redaction or aggregation would insufficiently prevent the disclosure of this material.

2. An agency should include the notifications described in Paragraph 1, or a link to those 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;
   d. On any part of the agency’s website that describes its rulemaking process or within any rule on rulemakings it may have, as described in Recommendation 2020-1, Rules on Rulemakings; 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 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. If agencies determine that such material does not qualify as protected, they should promptly notify the submitter of this finding with a brief statement of reasons.

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

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

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 discretion, should redact
the protected material and publish the rest of the comment. Redaction should be thorough
enough to prevent the public from discerning the redacted material, but not so broad as to
prevent the public from viewing non-protected material. In addition, all redactions made
pursuant to the Freedom of Information Act should include citations to the specific
exemptions being applied.

7. If redaction is not feasible within a comment, agencies should consider presenting the
data in a summarized form.

8. If redaction is not feasible across multiple, similar comments, agencies should consider
presenting any related information in an aggregated form. 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 information.

9. If the approaches identified in Paragraphs 6–8 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.

10. When deciding whether and how to redact, aggregate, or withhold protected material,
agencies should explore using 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
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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**

11. 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.

12. Such agencies should adopt policies to help them identify such information. Agencies should consider including the following, either in tandem or as alternatives, as part of their policies, including within any rules on rulemakings they may have, as described in Recommendation 2020-1, *Rules on Rulemakings*:

   a. Instructing submitters to clearly identify clearly 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.

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