



Request for Proposals—June 8, 2012

**The Administrative Record and
Judicial Review of Informal Agency Proceedings**

The Administrative Conference is seeking a consultant to undertake a research project that will consider the composition of administrative records prepared by federal agencies for use in informal agency proceedings and, if agency decisionmaking is challenged, for the purposes of review by federal courts. Proposals are due by 6:00 p.m. Eastern time on July 16, 2012.

Background

In the Administrative Procedure Act, Congress directed courts to “review the whole record or those parts of it cited by a party” to determine whether agency action is lawful.¹ This statutory language was originally understood as referring to formal proceedings. However, in *Overton Park and Camp v. Pitts*, the Supreme Court interpreted the Act as also encompassing the “administrative record” in informal agency proceedings where reviewable by statute or as final agency actions under 5 U.S.C. § 704.² This application to informal proceedings has given rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept. Congress has also legislatively ratified the concept, at least in some applications.³

Project

The Conference wishes to study the compilation of administrative records and their use as a basis for judicial review in conjunction with informal agency proceedings. A detailed scope of work follows. The Conference encourages prospective consultants to comment on the scope of work in their project proposals, and include/identify any additional research subjects related to this topic that the Conference may wish to consider.

Scope of Work

1. Survey and compile existing statutory mandates and agency policies and practices on record keeping in the context of informal agency decisionmaking of varied types.
 - a. Where agency policies exist, how are they promulgated, and do they bind agencies?
 - b. Is there variance between the records assembled for decisionmaking purposes and for litigation?

¹ 5 U.S.C. § 706.

² *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

³ See, e.g., Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(1)(B); Consumer Product Safety Act, 15 U.S.C. § 2060(a); Clean Air Act, 42 U.S.C. § 7607(d)(7)(A).



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- c. What role do various privileges play in the compilation of administrative records and where the Department of Justice is defending agency informal actions in litigation?
2. What record keeping requirements have courts imposed on agencies and what is the role of a reviewing court in overseeing record compilation and supplementation?
 - a. How far does the presumption that agencies have acted with regularity in compiling their administrative records extend?
 - a. Under what circumstances do courts allow evidentiary proceedings or discovery for record development?
 - b. What showing is required before a court requires or allows an agency to supplement a record?
3. What best practices can agencies follow in compiling records and in providing these resources to courts?

How to Submit a Proposal

Proposals are invited from qualified persons who would like to serve as a consultant on this project. All responses will be considered by the Conference staff and the Chairman.

A consultant's study should result in a report that is delivered first for review by the Conference staff and Chairman and then forwarded to a committee of the Conference membership. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape recommendations and may work with Conference staff to revise the report. Recommendations approved by the committee are then forwarded to the Council of the Conference and ultimately to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov/research/the-administrative-conference-project-process/>)

The Conference typically provides a consulting fee for a study plus a budget for expenses. The Conference also typically encourages its consultants to write up the results of their studies for publication. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice.

Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.



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To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Stephanie Tatham, Attorney Advisor at statham@acus.gov. *Proposals must be submitted by e-mail.*
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal (The Administrative Record and Judicial Review of Informal Agency Proceedings).
- Explain why you would be a well qualified to work on the project. Include your CV, or other summary of relevant experience.
- Explain how you would research the proposed project and how you would develop recommendations based on the research. There is no required format and 2-3 pages should probably be sufficient for this section.
- State how much funding you would need for expenses, keeping in mind that a typical Conference research contract will include a consulting fee of \$12,000 plus travel expenses of \$1,000, and research assistance expenses of \$1,000. There is some flexibility in the expense budget based on factors relating to the proposal (*e.g.*, the consultant's location relative to Washington, DC, and the need for research assistance and empirical or interviewing work), so your proposal should suggest any special needs in this regard. The amount of the expenses is not a critical factor in the award of the contract; the quality of the proposal and of the consultant's ability to carry out the study will be the most important factors.
- Propose a schedule for the project. The Conference's research projects typically call for submission of an outline, a draft report, and a final report. The draft report should be substantially complete and ready for consideration by the committee. Proposals for this project should target the submission of the draft report so that the recommendation can be targeted for completion at a plenary session of the Conference held in June 2013. A fall 2012 submission date for the draft report is preferred, but high quality research leading to a well-written report will be the prime consideration.

Submit your proposal by 6:00 p.m. Eastern time on July 6, 2012. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications of the researcher(s)
- The quality of the proposal
- The timeline of the proposal
- The likelihood that the research will lead to an Administrative Conference recommendation that will improve government
- The cost of the proposal (although the other factors are more important)



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Failure to follow the above instructions may result in your proposal not being considered. Including the phrase "ACUS Project Proposal" in the subject line of your e-mail is important so that your proposal can be easily identified.