



Working Group on Compiling Administrative Records

Office of the Chairman

Staff Counsel Report for Working Group | January 15, 2020

Members Attending

Reeve Bull
Peter Constantine
Claire Evans
Noelle Green
Allyson Ho
Lane Nemirow
Connor Raso
Melissa Rifkin
Peter Robbins
Adina Rosenbaum
Adam White
Matthew Wiener
Eric Womack

ACUS Staff Attending

Jeremy Graboyes (Staff Counsel)

Guests Attending

Tricia Choe
Melissa Creech
Megan Heller
Sarah Miller
Joseph Solomey
Radha Vishnuvajjala

1 This Report documents the Staff Counsel’s notes of the discussion of the Working Group
2 on Compiling Administrative Records at its second meeting on January 15, 2020. In its current
3 form, the Report does not represent the work product of the Working Group or any of its
4 members. The Working Group will discuss the Report at its second meeting. A subsequent draft
5 will reflect any comments by the Working Group or its members.

6 The Staff Counsel opened the meeting with the introduction of several new members and
7 an overview of the Working Group’s purpose, scope, and objectives. The Staff Counsel then
8 offered an opportunity for the Working Group’s members to provide comments on the Staff

9 Counsel Report documenting the meeting of October 29, 2019.¹ One member asked that the Staff
10 Counsel Report reflect that the Working Group, at its first meeting, also discussed the application
11 of the deliberative process privilege to the compilation of administrative records for judicial
12 review. The Working Group will discuss this subject further at a subsequent meeting.

13 For the bulk of its second meeting, the Working Group on Compiling Administrative
14 Records discussed materials that agency personnel should add to the rulemaking record or
15 otherwise preserve during the course of an informal rulemaking proceeding.² (The Working
16 Group will consider the contents of the public rulemaking docket and administrative record for
17 judicial review at subsequent meetings.³) The intent of the second meeting was to identify
18 relevant subjects agencies may wish to explain to personnel in publicly available policies on
19 compiling administrative records and best practices for clarifying pertinent legal concepts and
20 their application to common factual scenarios. Parts 2 and 3 of this Report address the Working
21 Group’s discussion of those subjects. Part 4 identifies related topics the Working Group may
22 wish to address in its final product. The Working Group also engaged in a preliminary discussion
23 of the structure and organization of its final product, addressed in Part 1.

24 **1. General Discussion of the Working Group’s Final Product**

25 The Working Group discussed two matters related to drafting its final product. As
26 explained in section (a), members of the Working Group expressed a preference for developing a
27 primarily descriptive handbook for policy makers rather than a prescriptive model guidance
28 document or model standard operating procedure. As discussed in section (b), the Working
29 Group reiterated the need to clearly distinguish among the rulemaking record, the public
30 rulemaking docket, and the administrative record for judicial review.

31 **a. Handbook for Policy Makers Versus Model Guidance**

32 Several members of the Working Group felt that the sheer range of agency structures,
33 agency rulemaking procedures, agency resources, and the profile of individual rulemaking

¹ See Jeremy Graboyes, Staff Counsel Report for Working Group on Compiling Administrative Records, October 29, 2019 (Dec. 27, 2019), <https://www.acus.gov/meeting-minutes/10-29-2019-meeting-staff-counsel-report-draft>.

² “Informal rulemaking proceeding” means a rulemaking conducted according to the notice-and-comment provisions of 5 U.S.C. § 553.

³ See *infra* Part 1.b. for a discussion of how the Administrative Conference distinguishes among the rulemaking record, the public rulemaking docket, and the administrative record for judicial review.

34 proceedings militates against developing a model guidance document or model standard
35 operating procedure. Instead, there seems to be a general preference for developing a primarily
36 descriptive handbook that would comprehensively examine the legal and practical subjects
37 agencies should consider as they develop their own policies on compiling administrative records.
38 The handbook would generally avoid prescribing best practices beyond those already identified
39 in Recommendation 2013-4.⁴

40 **b. Distinguishing Among the Rulemaking Record, the Public Rulemaking Docket,**
41 **and the Administrative Record for Judicial Review**

42 Several members of the Working Group noted that agency personnel may conflate three
43 related but separate concepts when they use the term “administrative record”: (1) the rulemaking
44 record, (2) the public rulemaking docket, and (3) the administrative record for judicial review.
45 Clearly identifying and differentiating among these three “buckets” may resonate with agency
46 personnel and clarify how different users throughout an agency—rulemaking and policy staff,
47 decision makers, litigating attorneys, and others—rely on the rulemaking record.

48 In brief, the “rulemaking record,” as the Administrative Conference uses the term, means
49 “the full record of materials before the agency in an informal rulemaking.” It includes “materials
50 required by law to be included in the rulemaking record,” “all comments and materials submitted
51 to the agency during comment periods,” and “any material that the agency considered,”
52 including materials otherwise protected from disclosure by law or privilege.⁵ Agencies often
53 refer to the rulemaking record by other names, such as the “decision file” at the Department of
54 the Interior⁶ and the “legal file” at the Internal Revenue Service.⁷ Other agencies encourage
55 rulemaking personnel to compile a less formal record during the course of a rulemaking without
56 specifically naming such a compendium.⁸

⁴ Admin. Conf. of the U.S, Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

⁵ *Id.*

⁶ Dep’t of the Interior, *Standardized Guidance on Compiling a Decision File and an Administrative Record*, at 4 (June 27, 2006), <https://www.fws.gov/policy/e1282fw5.pdf> [hereinafter DOI Guidance]. This guidance also references other terms, including “case file,” “action file,” “agency file,” “official file,” and “issue file.”

⁷ INTERNAL REVENUE MANUAL § 32.1.2.1, <https://www.irs.gov/irm/part32> [hereinafter IRS Guidance].

⁸ See ENVTL. PROTECTION AGENCY, ADMINISTRATIVE RECORDS GUIDANCE 11 (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance]; Nat’l Oceanic & Atmospheric Admin.,

57 The “public rulemaking docket” means “the public version of the rulemaking record
58 managed by the agency.” It includes “all information that the agency has made available for
59 public viewing” during the rulemaking process, such as online (e.g., regulations.gov) or in a
60 docket room.⁹ Agencies use the public rulemaking docket to manage the notice-and-comment
61 process mandated by the Administrative Procedure Act.¹⁰

62 The “administrative record for judicial review” means “the materials tendered by the
63 agency and certified to a court as the record on review of the agency’s regulatory action.” It is a
64 generally public-facing record that the agency puts forth to justify or defend its final rule before a
65 reviewing court.¹¹ Several Working Group members noted that when attorneys speak of the
66 “administrative record,” they frequently mean the administrative record for judicial review.

67 In general, the materials included in the public rulemaking docket comprise a subset of
68 the materials included in the administrative record for judicial review, and the materials included
69 in the administrative record for judicial review comprise a subset of the materials included in the
70 rulemaking record. Several members of the Working Group suggested that a graphical
71 visualization of these concepts, such as that which appears on page 11 of Leland Beck’s report,¹²
72 might be helpful to include in the Working Group’s final product.

73 The chief distinction between the rulemaking record, on the one hand, and the public
74 rulemaking docket and administrative record for judicial review, on the other, is that while
75 members of the public have access to both the public rulemaking docket and the administrative
76 record for judicial review, the rulemaking record exists only as an internal agency file. As a
77 result, concerns about non-disclosure that may be critical in compiling the public rulemaking
78 docket or the administrative record for judicial review should ordinarily not apply in the context
79 of the rulemaking record. Working Group members stressed the importance and usefulness of
80 stressing the *internal* nature of the rulemaking record, in order to avoid confusion, quell fears

Guidelines for Compiling an Agency Administrative Record, at 12 n.23 (Dec. 21, 2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf [hereinafter NOAA Guidance].

⁹ Recommendation 2013-4, *supra* note 4.

¹⁰ *See* 5 U.S.C. § 553.

¹¹ Recommendation 2013-4, *supra* note 4.

¹² Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* 11 (May 14, 2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report>.

81 surrounding the disclosure of internal documents and the chilling effect on compilation or
82 communication that could result, and encourage contemporaneous recordkeeping.

83 To clarify the important distinctions among these three concepts, several members
84 recommended that the Working Group’s final product should address them separately. Some
85 members also suggested that it may be a best practice for agencies, in their own written policies
86 on compiling administrative records, to provide clearly delineated guidelines for each of these
87 concepts. Because different agency personnel may be responsible for compiling each of the three
88 record types, this approach would also have the benefit of clarifying which instructions apply to
89 whom and for what purpose at specific stages of the rulemaking process.

90 **2. What Materials Should Agency Personnel Add to the Rulemaking Record?**

91 The Administrative Conference has urged agencies, in the absence of any statutory
92 requirement to the contrary, to include in the rulemaking record all materials “considered by the
93 agency during the course of the rulemaking.”¹³ At its first meeting, the Working Group
94 considered what constitutes “the course of the rule rulemaking.”¹⁴ At its second meeting, the
95 Working Group discussed what it means for “the agency” to have “considered” a material.

96 **a. “Considered”**

97 The Administrative Conference has defined “consideration” to entail “some minimum
98 degree of attention to the contents of a document.” It likely includes a material “reviewed in
99 order to evaluate its possible significant for the rulemaking” and likely excludes a material
100 merely “encountered while rummaging through a file drawer.”¹⁵ Put differently, the rulemaking
101 record likely contains “all written factual materials, studies, or reports substantially relied on or
102 seriously considered by the agency in formulating its proposed and final rule” but need not
103 necessarily “encompass every study, report, or other document that the agency may have in its
104 files or has otherwise used.”¹⁶ Whether the agency “considered” a material can be a highly fact-
105 intensive inquiry. Nevertheless, the Conference recommended that rulemaking personnel

¹³ Recommendation 2013-4, *supra* note 4, ¶ 1.

¹⁴ See Graboyes, *supra* note 1.

¹⁵ Recommendation 2013-4, *supra* note 4.

¹⁶ See Admin. Conf. of the U.S., Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994).

106 interpret the concept so as to “fulfill its purpose of generating a body of materials by which the
107 rule can be evaluated and to which the agency . . . may refer in the future.”¹⁷

108 Existing agency policies adopt several formulations to explain to rulemaking personnel
109 which materials satisfy this standard, directing personnel to consider:

- 110 • whether the material has a “logical connection” to the action under consideration;¹⁸
- 111 • whether the material contains information that is “related to the agency decision at
112 issue”¹⁹ or “relevant to the decision;”²⁰
- 113 • whether the material contains “important substantive information”²¹ or “substantive
114 factual information and data that is relevant to the full range of concerns at issue in
115 the decision;”²²
- 116 • whether the material was “relied upon or considered by the agency;”²³
- 117 • whether the material helps or is necessary to “explain the agency decision-making
118 process,”²⁴ tell “the complete ‘story’ of the agency decision-making process”²⁵ or
119 “show the complete history of the agency decision-making process;”²⁶
- 120 • whether the material is necessary to document that the agency complied with
121 “relevant statutory, regulatory, and agency requirements”²⁷ or “followed the required
122 procedures and met the legal standards and criteria found in applicable laws,
123 regulations, and relevant agency policies,”²⁸ or that the agency’s action is “consistent
124 with statutory and regulatory requirements;”²⁹ and

¹⁷ Recommendation 2013-4, *supra* note 4.

¹⁸ DOI Guidance, *supra* note 6, at 2; NOAA Guidance, *supra* note 8, at 6–7.

¹⁹ DOI Guidance, *supra* note 6, at 2.

²⁰ NOAA Guidance, *supra* note 8, at 6–7; EPA Guidance, *supra* note 8, at 5.

²¹ DOI Guidance, *supra* note 6, at 2.

²² NOAA Guidance, *supra* note 8, at 6.

²³ DOI Guidance, *supra* note 6, at 2.

²⁴ DOI Guidance, *supra* note 6, at 2.

²⁵ DOI Guidance, *supra* note 6, at 2.

²⁶ NOAA Guidance, *supra* note 8, at 6.

²⁷ DOI Guidance, *supra* note 6, at 2.

²⁸ NOAA Guidance, *supra* note 8, at 6.

²⁹ EPA Guidance, *supra* note 8, at 5.

125 • whether the material is necessary to explain why the agency’s action is
126 “reasonable,”³⁰ to document “a reasoned decision-making process,”³¹ or to
127 “[r]ationally explain the agency’s decisions.”³²

128 Whether the agency agrees with the information material or whether the information
129 ultimately supports the agency’s action is irrelevant to determining whether it was
130 “considered.”³³ With respect to “contrary materials,” existing agency policies direct personnel to:

- 131 • document relevant information that “supports or is contrary to the action taken by [the
132 agency];”³⁴
- 133 • preserve materials considered by the agency “both in support of and contrary to the
134 agency position”³⁵ and “regardless of whether they support or oppose the agency’s
135 position;”³⁶
- 136 • document “options considered and rejected by the agency;”³⁷
- 137 • show “how [the agency] reviewed contrary information and why [it] came to the
138 decision that it did notwithstanding that information;”³⁸ and
- 139 • “[d]emonstrate consideration of opposing views of facts or data or alternative courses
140 of action, if any, and provide a thorough explanation as to why the preferred course of
141 action was adopted.”³⁹

142 One Working Group member noted that it may be important to educate rulemaking personnel
143 that the purpose of compiling a rulemaking record is to document a reasoned decision-making
144 process rather than an “advocacy exercise.” Skewing the record by including only materials that
145 support an agency action can create more work for the agency down the road. An inadequate
146 administrative record for judicial review may affect the deference a court gives to the agency’s

³⁰ EPA Guidance, *supra* note 8, at 5.

³¹ DOI Guidance, *supra* note 6, at 2.

³² NOAA Guidance, *supra* note 8, at 6.

³³ See Recommendation 2013-4, *supra* note 4. Cf. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. ATTY. BULL. 8 (Feb. 2000), <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf>.

³⁴ EPA Guidance, *supra* note 8, at 5.

³⁵ NOAA Guidance, *supra* note 8, at 6.

³⁶ DOI Guidance, *supra* note 6, at 5.

³⁷ DOI Guidance, *supra* note 6, at 2.

³⁸ EPA Guidance, *supra* note 8, at 5.

³⁹ NOAA Guidance, *supra* note 8, at 6.

147 decision, for example, and courts may order discovery if a party rebuts the presumption of
148 regularity in the agency’s record compilation.⁴⁰

149 **b. “By the Agency”**

150 At its core, “the agency” means the final decision maker.⁴¹ As a general rule, personnel
151 should add to the rulemaking record those materials that the final decision maker has actually
152 considered as part of the rulemaking.

153 Courts have held that consideration by the agency also includes “indirect consideration”
154 by the final decisionmaker.⁴² The Conference has defined consideration “by the agency” to entail
155 “review by an individual with substantive responsibilities in connection with the rulemaking.”⁴³
156 Existing agency policies instruct personnel to add to the rulemaking record those materials that
157 the decision maker has “directly” or “indirectly” considered,⁴⁴ including:

- 158 • “substantive documents . . . [t]hat were available to the decision-maker at the time the
159 decision was made (i.e., considered by staff involved in the decision process as it
160 proceeded through the agency), regardless of whether they were specifically reviewed
161 by the decision maker;”⁴⁵ and
- 162 • any relevant material that “informs, or has the potential to inform, the decision-
163 maker.”⁴⁶

164 Members of the Working Group noted it can be difficult to define when, and under what
165 circumstances, consideration by an individual other than the final decision maker constitute
166 consideration “by the agency.” Agencies should consider, for example, who counts as a “direct
167 advisor” to the final decision maker, and what materials lower-level personnel relied on to brief
168 or prepare materials for the final decision maker or a direct advisor.

⁴⁰ See DOI Guidance, *supra* note 6, at 2; EPA Guidance, *supra* note 8, at 5.

⁴¹ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419–20 (1971).

⁴² *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

⁴³ Recommendation 2013-4, *supra* note 4.

⁴⁴ EPA Guidance, *supra* note 8, at 5; NOAA Guidance, *supra* note 8, at 6; *accord* Goldfrank, *supra* note 33, at 8.

⁴⁵ DOI Guidance, *supra* note 6, at 5.

⁴⁶ NOAA Guidance, *supra* note 8, at 6.

169 Determining what constitutes “indirect consideration” will vary significantly from agency
170 to agency depending on internal rulemaking practices, agency organizational and hierarchical
171 structures, and other factors and indeed may vary according to the circumstances of particular
172 rulemaking proceedings and the materials in question. Given the difficult and fact-intensive
173 nature of this inquiry, several members of the Working Group suggested that, when in doubt,
174 rulemaking personnel should err on the side of adding materials to the rulemaking record. As an
175 example, one member of the Working Group suggested that rulemaking personnel should at least
176 consider adding to the rulemaking record a communication between two regulatory specialists.

177 **3. How Should Agency Policies Explain to Personnel What Materials They Should**
178 **Add to the Rulemaking Record?**

179 Existing agency policies tend to employ some combination of four primary tactics to
180 explain to personnel which materials they should add to the rulemaking record during an
181 informal rulemaking proceeding:

- 182 1. An explanation for agency personnel of the general standard they should use to
183 determine whether to add a material to the rulemaking record, i.e., whether the
184 material was “considered” by “the agency.”
- 185 2. An explanation for agency personnel of how they and others in the agency rely on the
186 rulemaking record, such as to create the administrative record for judicial review in
187 the event of litigation. This may encourage personnel to add materials to the
188 rulemaking record in a manner that best satisfies those needs.
- 189 3. Guidelines to help agency personnel determine whether to add to the rulemaking
190 record items from specific categories of materials, such as emails and drafts.
- 191 4. Statements that encourage personnel to err on the side of adding a potentially relevant
192 and significant material to the rulemaking record without overanalyzing the question
193 of whether the material was indeed “considered” by “the agency,” and to consult a
194 designated attorney or records custodian as necessary.

195 The Working Group considered the potential benefits and drawbacks of each of these tactics, as
196 discussed in the following sections.

197 As a general matter, several members voiced a preference for a broader approach that
198 would combine the first and fourth tactics—one that both stresses a general standard for
199 including materials in the rulemaking record and encourages rulemaking personnel to err on the
200 side of overinclusion. Members also noted, however, that the approach should not be excessively
201 broad. As a matter of course, the rulemaking record should not, for example, include every
202 email, draft, or personal note tangentially related to the subject of the rulemaking. The chief
203 difficulty is crafting a policy that accomplishes recordkeeping that is reasonably complete but
204 does not become needlessly excessive, unwieldy, or time-consuming.

205 Some members noted because current technologies allow individual rulemaking staff to
206 easily store and track emails, draft documents, and other digital materials and compile them at a
207 later date should the need arise. This may reduce the need to comprehensively add such materials
208 to a centralized record during the rulemaking process. The Working Group will discuss the
209 means by which agency personnel add materials to the rulemaking record at its third meeting.

210 Several Working Group members emphasized the importance of establishing clear, ex
211 ante policies for to ensure that everyone involved in all stages of the rulemaking process (from
212 initial development through litigation) understands which materials rulemaking agency personnel
213 will ordinarily add to a centralized record during the rulemaking process and, just as
214 significantly, which materials they ordinarily will not. As part of establishing clear policies,
215 agencies should tailor explanations in written policies to account for the range of professionals
216 involved in standard agency proceedings, many of whom are not attorneys or may have limited
217 familiarity with rulemaking procedures.

218 **a. General Standard for Adding Materials to the Rulemaking Record**

219 Existing agency guidance documents typically include a general standard for including
220 materials in the rulemaking record along the lines of that proposed by the Administrative
221 Conference—all “materials considered by the agency during the course of the rulemaking”—
222 along with general guidelines to help personnel, especially non-legal personnel, quickly and
223 easily determine whether a specific material satisfies this standard.⁴⁷ Part 2 of this Report
224 provides a more detailed discussion of the language used in existing agency policies.

⁴⁷ See *supra* Part 2.

225 The Working Group’s discussion suggests that the general standard—“considered by the
226 agency”—essentially boils down to two factors: (1) relevance to the rulemaking, and
227 (2) significance in the rulemaking process. Existing agency policies and several Working Group
228 members emphasized the importance of stressing that the rulemaking record should document
229 the “story” of the rulemaking process, which could include materials that personnel may not
230 intuitively think to add to the rulemaking record, including certain procedural materials, contrary
231 materials, or materials not directly considered by the final decision maker.

232 **b. Explaining How Agency Personnel Use the Rulemaking Record**

233 The creation of a general rulemaking record by agency personnel throughout the
234 rulemaking process results in a “single organized source of information that records the agency
235 decision and decision-making process” that agency personnel can use to efficiently and
236 accurately compile complete records for these other, more specific purposes.⁴⁸ For example,
237 personnel may rely on the rulemaking record to manage the public rulemaking docket, compile
238 an administrative record for judicial review, aid a final decision maker, memorialize an agency
239 decision making process after its conclusion, or comply with general or agency-specific
240 recordkeeping policies.⁴⁹ The Working Group discussed the benefits of contemporaneous
241 recordkeeping at its first meeting.⁵⁰

242 Several members of the Working Group noted the importance of ensuring that
243 rulemaking personnel are aware of their role in broader agency processes, which may encourage
244 them to compile a rulemaking record that best satisfies the agency’s broader needs. Several
245 existing agency policies describe the importance of managing the rulemaking record during an
246 informal rulemaking proceeding to facilitate other agency recordkeeping needs and obligations.⁵¹
247 Agency policies may also describe how an *incomplete* rulemaking record can impose
248 administrative burdens or result in undesirable legal outcomes.⁵²

⁴⁸ DOI Guidance, *supra* note 6, at 5; *see also* Recommendation 2013-4, *supra* note 4, ¶ 4; Graboyes, *supra* note 1, at 7–8.

⁴⁹ *See generally* Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 9–10 (2018).

⁵⁰ Graboyes, *supra* note 1, at 7–8.

⁵¹ DOI Guidance, *supra* note 6, at 1–3; EPA Guidance, *supra* note 8, at 4–5; NOAA Guidance, *supra* note 8, at 2.

⁵² EPA Guidance, *supra* note 8, at 4–5.

249 **c. Guidelines on Specific Categories of Rulemaking Materials**

250 Besides encouraging agencies to ensure that rulemaking records include “materials
251 considered by the agency during the course of the rulemaking,” the Administrative Conference
252 urged agencies to also include the following specific materials in rulemaking records:

- 253 • “notices pertaining to the rulemaking;”
- 254 • “comments and other materials submitted to the agency related to the rulemaking;”
- 255 • “transcripts or recordings, if any, of oral presentations made in the course of a
256 rulemaking;”
- 257 • “reports or recommendations of any relevant advisory committees;” and
- 258 • “other materials required by statute, executive order, or agency rule to be considered
259 or to be made public in connection with the rulemaking.”⁵³

260 Recommendation 2013-4 recommends that agency policies address “essential components of the
261 rulemaking record” and “appropriate exclusions from the rulemaking record, including guidance
262 on whether and when to exclude materials such as personal notes or draft documents.”⁵⁴

263 In addition to providing a general standard for adding materials to the rulemaking record,
264 existing agency policies similarly provide guidance on specific categories of materials that
265 rulemaking staff are likely to encounter during the course of a rulemaking. Depending on the
266 category described, existing agency guidance may direct personnel to always add certain
267 materials to the rulemaking record, never add certain materials to the rulemaking record, or
268 provide guidelines for determining whether to add certain materials to the rulemaking record.

269 Specific categories of materials these guidance documents address include: (a) advisory
270 committee materials; (b) internal advisory materials, briefing materials, option papers, and
271 reports; (c) confidential business information; (d) consultant or contractor materials; (e) data,
272 technical information, and technical analysis; (f) draft materials and intra-agency comments;
273 (g) electronic communications (e.g., emails); (h) interagency communications (especially
274 communications with the Office of Management and Budget); (i) internal workflow materials
275 (such as forms and memoranda associated with an agency’s internal rulemaking process);

⁵³ Recommendation 2013-4, *supra* note 4, ¶ 1.

⁵⁴ *Id.*, ¶ 11.

276 (j) analyses or documentation required by law or policy; (k) legal materials and agency policies
277 and directives; (l) documentation of internal meetings and oral communications;
278 (m) documentation of meetings and oral communications with individuals or entities outside the
279 agency; (n) memoranda to the file; (o) personal notes; (p) materials associated with a previous
280 rulemaking; (q) electronic publications (e.g., webpages); (r) print publications; (s) public
281 submissions (e.g., comments and petitions); (t) public notices (e.g., Federal Register notices);
282 (u) other publicly released or publicly available materials; (v) materials referenced in other
283 materials added to the rulemaking record (e.g., sources cited in public comments); and
284 (w) communications with state governments.⁵⁵ Agencies have developed more detailed guidance
285 with respect to certain categories of materials, especially electronic communications (emails),
286 electronic publications (webpages), draft materials, and personal notes.⁵⁶

287 Several members of the Working Group noted potential drawbacks associated with
288 category-specific guidelines. While some members believed category-specific guidelines can be
289 appropriate, for example for certain “high-level, formalized documents,” several raised concerns
290 that by emphasizing category-specific guidelines over a general “relevance” standard, agencies
291 may risk valuing a material’s form over its substance. One member noted by providing guidance
292 on specific categories of materials, agencies may risk excluding important categories. Category-
293 specific guidelines may also become dated as new technologies and business processes develop.
294 Several members agreed that, in determining whether to add a material to the rulemaking record,
295 the most important consideration is the material’s content and its significance in the rulemaking
296 process. Hypotheticals illustrating how agency personnel should analyze whether a specific
297 material satisfies the general relevance standard strike be a practical balance.

298 Several Working Group members noted that in addition to or in lieu of category-specific
299 guidelines, it may be worth emphasizing to personnel that “materials that belong in the
300 rulemaking record can take a wide variety of forms.” One member noted that it may not be
301 intuitive to personnel that they should add some forms of (especially informal) materials to the
302 rulemaking record, such as instant messaging, text messaging, voicemails, call logs, and
303 congressional materials. Another member noted that agency policies should perhaps instruct

⁵⁵ See Memorandum from Jeremy Graboyes to the Working Gp. on Compiling Admin. Records 8–23 (Dec. 27, 2019), <https://www.acus.gov/memorandum/components-and-exclusions-rulemaking-records>.

⁵⁶ *Id.* 23–24.

304 personnel to avoid using certain means, such as text messaging, to communicate about an
305 ongoing rulemaking. Other members suggested that personnel should, as necessary, use emails
306 or memoranda to the record to document the substance and context of significant internal oral
307 communications, identify all participants, and provide access to any documents that were
308 exchanged. In some cases, personnel may wish to consider including a third party on the email,
309 such a headquarters Office of General Counsel attorney. A useful source of language may be the
310 Environmental Protection Agency’s “fishbowl” (transparency) memorandum.⁵⁷

311 Relatedly, agencies may wish to instruct rulemaking personnel to clarify when it is
312 appropriate to converse with external parties. Useful sources of language may be the
313 Conference’s recommendation on “*Ex Parte*” *Communications in Informal Rulemaking*, which
314 may be helpful to develop such a checklist,⁵⁸ and the Environmental Protection Agency’s
315 “fishbowl” (transparency) memorandum.⁵⁹ Best practices following an external conversation
316 may include adding a memorandum to the file to the public rulemaking docket that documents
317 the communication; alerting the stakeholder that the memorandum has been added to the docket,
318 advising the stakeholder that the memorandum is not necessarily official; and encouraging the
319 stakeholder to follow up with a written comment for inclusion in the public rulemaking docket.
320 At a certain stage in the rulemaking process, it may also be advisable for officials to abstain from
321 oral communications about the rulemaking with external parties. One member suggested that a
322 checklist for officials, documenting these and any other steps, may be helpful.

323 There was also some brief discussion of how to handle hyperlinked materials, for
324 example by screenshotting or printing out shared webpages. The Working Group will discuss
325 best practices for adding materials to the rulemaking record at its next meeting.

326 **d. Encouraging Overinclusion and Consultation**

327 Given the complex and fact-intensive nature of determining whether a material has been
328 “considered by the agency,” existing agency guidance documents typically encourage

⁵⁷ See Email from Andrew Wheeler, Acting EPA Administrator, to EPA Employees (July 30, 2018), <https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf>; see also EPA Administrator William D. Ruckelshaus, *Contacts with Persons Outside the Agency* (May 19, 1983), <https://www.regulationwriters.com/downloads/EPA-Fishbowl-Memo-05-19-1983-Ruckelshaus.pdf>.

⁵⁸ Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

⁵⁹ See *supra* note 57.

329 rulemaking personnel to err on the side of adding potentially relevant and significant documents
330 to the rulemaking record.⁶⁰ This tactic has the potential to save time and reduce error by leaving
331 complicated line-drawing questions to records custodians and specialized attorneys. When
332 questions do arise, existing agency guidance documents typically direct rulemaking personnel to
333 a designated official, such as an attorney or records custodian.⁶¹

334 Working Group members were generally in favor of encouraging overinclusion,
335 especially for materials that rulemaking personnel may not naturally amass in the record such as
336 contrary materials and documentation of alternatives. Overinclusion best ensures that personnel
337 responsible for compiling more specialized records, especially the administrative record for
338 judicial review, can access all materials they need. When compiling an administrative record for
339 judicial review, it is generally easier to winnow the available materials down to a proper record
340 than to identify and access any missing materials.

341 There was some discussion as to whether rulemaking personnel should err on the side of
342 overinclusion in every rulemaking proceeding, or whether more comprehensive recordkeeping is
343 better suited to certain proceedings, such as those that are potentially “controversial” or “high-
344 profile,” pose a litigation risk, or generate “non-minimal public interest.” Members were
345 generally in favor of a more flexible approach tailored to public interest or litigation risk. The
346 Working Group asked whether there is some clear, objective measure of public interest or
347 litigation risk that agencies could incorporate in their own policies.

348 Working Group members were also generally in favor of encouraging rulemaking
349 personnel to consult with a designated attorney or other specialist as needed. The general sense
350 was that General Counsel’s offices might prefer to receive too many questions than too few.

351 **4. Topics the Working Group May Wish to Address in its Final Product**

352 Based on this Report, the Working Group may wish to address some or all of the
353 following topics in its final product:

⁶⁰ Beck, *supra* note 12, at 28.

⁶¹ DOI Guidance, *supra* note 6, at 3–8; EPA Guidance, *supra* note 8, at 3–4; NOAA Guidance, *supra* note 8, at 8–9;
see also Beck, *supra* note 12, at 32.

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- How do the rulemaking record, the public rulemaking docket, and the administrative record for judicial review differ?
 - What materials should agency personnel add to the rulemaking record? What is the general standard agency personnel should use to determine whether to add a material to the rulemaking record?
 - If the general standard is whether a material was “considered by the agency during the course of the rulemaking,” what does it mean for “the agency” to have “considered” the material? Topics for discussion may include relevance and significance, contrary materials, and direct versus indirect consideration.
 - How do personnel use the rulemaking record? What purpose does it serve? Topics for discussion may include other recordkeeping requirements such as the public rulemaking docket and compilation of the administrative record for judicial review.
 - What is the range of categories of materials that personnel should consider adding to the rulemaking record? The final product may emphasize the importance of focusing on the context and substance of a material rather than its form. It may identify non-intuitive categories of materials that personnel should consider adding to the rulemaking record. It may encourage personnel to avoid using certain means of communicating about an ongoing rulemaking. It may also provide instructions on the appropriateness of oral communications with external parties and encourage personnel to document external communications when they occur.
 - How should personnel handle questions about whether to add a material to the rulemaking record? The final product may address erring on the side of overinclusion and designating an office to which personnel should direct questions.