



## Working Group on Compiling Administrative Records

### Office of the Chairman

#### Staff Counsel Report for Working Group | February 23, 2021

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##### Members Attending

Reeve Bull  
Kelly Dunbar  
Noelle Green  
Lane Nemirow  
Melissa Rifkin  
Adina Rosenbaum  
Erick Womack  
Adam White  
Matthew Wiener

##### ACUS Staff Attending

Jeremy Graboyes (Staff Counsel)  
Bobby Ochoa  
Todd Rubin  
Gavin Young

##### Guests Attending

Megan Heller (DOC)  
Tim Mullins (DOT)  
Emily Lesniak (IRS)

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1           This Report documents the Staff Counsel’s notes of the discussion of the Working Group  
2 on Compiling Administrative Records at its fourth meeting on February 23, 2021. 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 fourth meeting. A subsequent draft  
5 will reflect any comments by the Working Group or its members.

6           The Staff Counsel opened the meeting by offering an opportunity for the Working  
7 Group’s members to provide comments on the Staff Counsel Report documenting the meeting of  
8 July 21, 2020.<sup>1</sup> There were no comments.

9           At its first three meetings, the Working Group discussed best practices for explaining to  
10 agency personnel which materials they should add to internal rulemaking records, i.e., “the full

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<sup>1</sup> See Jeremy Graboyes, Staff Counsel Report for Working Group on Compiling Administrative Records, July 21, 2020 (July 21, 2021), <https://www.acus.gov/meeting-minutes/07-21-2020-meeting-staff-counsel-report-draft>.

11 record materials before the agency in an informal rulemaking,” including those materials which  
12 are not ordinarily made publicly available.<sup>2</sup>

13 At its fourth meeting, the Working Group turned to the public rulemaking docket, i.e.,  
14 “the public version of the rulemaking record managed by the agency, regardless of location, such  
15 as online at Regulations.gov or an agency website or available for physical review in a docket  
16 room.”<sup>3</sup> Specifically, the Working Group discussed best practices for explaining to agency  
17 personnel which materials they should add to or exclude from public rulemaking dockets. The  
18 Working Group will discuss the mechanics of docket compilation at its fifth meeting, including  
19 the location at which specific materials are made publicly available.

20 Part 1 of this Report explains the public rulemaking docket’s purpose and legal  
21 requirements. Part 2 addresses the materials agencies should add to the public rulemaking  
22 docket, as well as best practices for explaining those principles to agency personnel responsible  
23 for managing rulemaking dockets. Part 3 addresses the materials agencies may or must exclude  
24 from the public rulemaking docket, as well as best practices for explaining those principles to  
25 agency personnel responsible for managing rulemaking dockets. Part 4 identifies related topics  
26 the Working Group may wish to address in its final product.

## 27 **1. What Is the Public Rulemaking Docket?**

28 Agencies use dockets to facilitate public participation in the rulemaking process by  
29 ensuring that members of the public can review and comment on significant materials related to  
30 the proposed rule. Indeed, failure to ensure public access to critical rulemaking materials during  
31 informal rulemaking may result in remand on judicial review.

32 Several statutes and executive orders (EOs) define the basic contents of public  
33 rulemaking dockets. As discussed in greater detail below, these include, among others, the  
34 Administrative Procedure Act (APA), the E-Government Act, the Regulatory Flexibility Act, the  
35 Privacy Act, the Unfunded Mandates Reform Act, EO 12866, and EO 13563. Agencies have also  
36 adopted their own rules, policies, and practices. Some statutes, orders, rules, policies, and

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<sup>2</sup> Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Information Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013). “Informal rulemaking” means rulemaking conduct according to the notice-and-comment provisions of 5 U.S.C. § 553.

<sup>3</sup> *Id.*

37 practices dictate which materials agency personnel should add to public rulemaking dockets;  
38 others permit or require personnel to withhold certain materials from the docket.

39 **2. What Records Should Rulemaking Personnel Add to the Public Rulemaking**  
40 **Docket?**

41 The Working Group discussed the following categories of records identified in relevant  
42 statutes, EOs, and agency materials:

- 43 (1) rulemaking notices;
- 44 (2) written submissions in response to rulemaking notices;
- 45 (3) procedural requests (e.g., requests for oral presentations, comment-period  
46 extensions) and associated materials;
- 47 (4) materials related to public meetings and hearings;
- 48 (5) materials related to ex parte communications;
- 49 (6) economic, environmental, and other regulatory assessments;
- 50 (7) other background materials (e.g., studies, reports, data, and other factual materials  
51 upon which the agency relies);
- 52 (8) inter-agency communications;
- 53 (9) draft rules and notices;
- 54 (10) rulemaking petitions and associated materials;
- 55 (11) advisory committee records, reports, and recommendations;
- 56 (12) records specific to multi-member boards and commissions; and
- 57 (13) indexes.

58 The following sections address each category in turn. The Working Group did not identify any  
59 additional categories during its discussion.

60 **a. Rulemaking Notices**

61 The APA requires agencies to publish a notice of proposed rulemaking (NPRM) in the  
62 *Federal Register* for each rulemaking. Agencies must also publish the final rule in the *Federal*  
63 *Register*.<sup>4</sup> In addition to the NPRM and final rule, agencies may publish, among other notices:

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<sup>4</sup> 5 U.S.C. § 553(b)–(c).

64 advance NPRMs, supplemental NPRMs, and other information requests; notices withdrawing or  
65 terminating a proposed rulemaking; and procedural notices, such as those extending the time  
66 period for public comments or announcing a public meeting or hearing. Several agencies have  
67 adopted rules or guidance directing rulemaking staff to add some or all of these materials to the  
68 public rulemaking docket. ACUS has likewise recommended, and the Working Group agreed,  
69 that agencies should generally include all “notices pertaining to the rulemaking” in the public  
70 rulemaking docket.<sup>5</sup>

71 **b. Procedural Requests and Associated Materials**

72 Members of the public sometimes make procedural requests related to a rulemaking—  
73 asking, for example, that the agency provide an opportunity for oral presentation or extend the  
74 public comment period. Some agencies maintain such requests in the public rulemaking docket.  
75 Agencies may wish to explain to rulemaking personnel whether they should add such requests,  
76 and any related agency responses, to the public rulemaking docket.

77 **c. Written Communications Between Agency Officials and Members of the**  
78 **Public**

79 The APA requires agencies to “give interested persons an opportunity to participate in the  
80 rule making through submission of written data, views, or arguments.”<sup>6</sup> Agencies typically  
81 satisfy this requirement by instructing the public, in the NPRM, to submit written comments in a  
82 specific manner (e.g., through an online portal or by mail to a named contact) by a specific  
83 deadline. The E-Government Act requires agencies to add properly and timely submitted  
84 comments to the docket.<sup>7</sup>

85 More complicated questions may arise with respect to relevant materials that a member  
86 of the public submits to the agency or an agency official in an alternative manner (e.g., by email,  
87 by phone or in person, through social media) or outside the public comment period (either before  
88 publication of the NPRM or after the deadline for submitting comments). Additional questions

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<sup>5</sup> Recommendation 2013-4, *supra* note 2, ¶ 2.

<sup>6</sup> 5 U.S.C. § 553(c).

<sup>7</sup> Pub. L. No. 107-347, 116 Stat. 2899 (2002).

89 may arise with respect to materials, especially voluminous materials, that are attached to or  
90 incorporated by reference in public comments.

91 The Working Group agreed that, within the bounds established by federal law and  
92 judicial decisions regarding ex parte communications, it would be difficult to prescribe a policy  
93 regarding the addition of such submissions to the public rulemaking docket that would make  
94 sense for all rulemakings at all agencies. Members of the Working Group instead emphasized  
95 that agencies should develop and adhere to clear policies regarding the treatment of such  
96 submissions. Many have already done so, particularly through rules and policies governing the  
97 disclosure of ex parte communications. Agencies should refer to the following ACUS  
98 recommendations for more detailed guidance on how to develop such policies:

- 99 • Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*;<sup>8</sup>
- 100 • Recommendation 2013-5, *Social Media in Rulemaking*;<sup>9</sup> and
- 101 • Recommendation 2011-2, *Rulemaking Comments*.<sup>10</sup>

102 Agencies should also consider how they can most effectively communicate the principles  
103 established in such policies to rulemaking personnel.

104 **d. Oral Communications Between Agency Officials and Members of the Public**

105 As with written communications, the Working Group agreed that, within the bounds  
106 established by federal law and judicial decisions regarding ex parte communications, it would be  
107 difficult to prescribe a policy regarding the addition of oral communications to the public  
108 rulemaking docket that would make sense for all rulemakings at all agencies. Members of the  
109 Working Group instead emphasized that agencies should develop and adhere to clear policies  
110 regarding the treatment of such communications. Many have already done so, particularly  
111 through rules and policies governing the recordation and disclosure of ex parte communications.

112 Agencies may wish to consider ACUS Recommendation 2014-4, *“Ex Parte”*  
113 *Communications in Informal Rulemaking*, to develop such policies. Agencies should also

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<sup>8</sup> 79 Fed. Reg. 35993 (June 25, 2014).

<sup>9</sup> 78 Fed. Reg. 76269 (Dec. 17, 2013).

<sup>10</sup> 76 Fed. Reg. 48791 (Aug. 9, 2011).

114 consider how they can most effectively communicate the principles established in such policies  
115 to rulemaking personnel.

116 One member of the Working Group recommended that agencies develop a standardized  
117 form that agency officials can use to memorialize ex parte, oral communications and that  
118 rulemaking staff can easily add to the public rulemaking docket when appropriate.

119 **e. Materials Related to Public Meetings and Hearings**

120 Agencies sometimes organize public meetings or hearings related to ongoing  
121 rulemakings, as required by law or to provide an additional opportunity for public participation.  
122 Consistent with ACUS’s recommendations,<sup>11</sup> the Working Group agreed it is typically in an  
123 agency’s interest to record and/or transcribe such an event and to make a recording or transcript  
124 publicly available during the rulemaking. Current technologies make it easy for agency officials  
125 to record public events and make them available online. One member noted that agencies cannot  
126 currently add audio or video recordings to Regulations.gov. This may counsel in favor of  
127 preparing transcripts, which agency personnel can easily upload to online dockets after events.

128 Agency officials may exchange written materials with members of the public at such  
129 events. Officials may also discuss rulemaking-related matters off the record with members of the  
130 public. As noted during the Working Group’s discussion, agency ex parte communications  
131 policies likely cover such materials and communications. Some agencies have nevertheless  
132 adopted rules or policies that specifically direct personnel to add such materials to the public  
133 rulemaking docket. Other agencies may wish to do so as well.

134 Finally, agency officials may maintain other records regarding public meetings and  
135 hearings, such as lists of speakers and attendees. At least one agency directs personnel to add  
136 such materials to the public rulemaking docket. Other agencies may wish to do so as well.

137 **f. Economic, Environmental, and Other Regulatory Assessments**

138 Several statutes and EOs require agencies to prepare and make publicly available  
139 assessments of a proposed rule’s economic, environmental, or other regulatory impact. They

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<sup>11</sup> Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 8(a)(viii)–(ix), 84 Fed. Reg. 2146 (Feb. 6, 2019); *see also* Recommendation 2013-4, *supra* note 2, ¶ 1(c).

140 include the Regulatory Flexibility Act, Paperwork Reduction Act, Privacy Act, National  
141 Environmental Policy Act (NEPA), and Unfunded Mandates Reform Act. EO 12866, in  
142 particular, requires agencies to make certain assessments publicly available in certain contexts.

143 The Office of Information and Regulatory Affairs (OIRA) has recommended that  
144 agencies include such assessments in the public rulemaking docket.<sup>12</sup> Several agencies have also  
145 adopted rules directing rulemaking personnel to add them to the docket. Agencies may wish to  
146 address the inclusion of such materials in guidance to rulemaking personnel.

147 One participant noted that agencies frequently establish separate dockets for NEPA  
148 materials. Agencies that regularly consider or rely on such materials for rulemaking purposes  
149 may wish to explain to rulemaking personnel whether—and, if so, how—they should add them  
150 to the public docket.

151 **g. Other Background Materials**

152 The APA requires agencies to “give interested persons an opportunity to participate in the  
153 rule making through submission of written data, views, or arguments.”<sup>13</sup> Under the prevailing  
154 judicial interpretation of this provision, agencies must make the “critical factual material”  
155 underlying proposed rules—e.g., technical studies, staff reports, data, and methodologies—  
156 available for public comment.<sup>14</sup> Consistent with this principle, EO 13563 requires agencies to  
157 include “relevant scientific and technical findings” in the public rulemaking docket.

158 ACUS, too, has recommended that agencies include in the docket: (a) studies and report  
159 on which the proposal relies; (b) references to the scientific literature, underlying data, models,  
160 and researching results that the agency considered, including a list of all information on which it  
161 relied and any material information it considered but on which it did not rely; (c) data underlying  
162 scientific research, including privately and federally funded research; and (d) conflict of interest  
163 disclosures for scientific research.<sup>15</sup> More broadly, ACUS has recommended that agencies

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<sup>12</sup> Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, to the President’s Management Council (May 28, 2010).

<sup>13</sup> 5 U.S.C. § 553(c).

<sup>14</sup> *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999); *see also* *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

<sup>15</sup> Recommendation 2013-4, *supra* note 2, ¶ 2; Admin. Conf. of the U.S., Recommendation 2013-3, *Science in the Administrative Process*, ¶¶ 3, 10–11, 78 Fed. Reg. 41357 (July 10, 2013); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, ¶ 4, 76 Fed. Reg. 48789 (Aug. 9, 2011).

164 include “any other materials considered by the agency during the course of the rulemaking,”  
165 subject, of course, to “legal limitations on disclosure, any claims of privilege, or any exclusions  
166 allowed by law that the agency chooses to invoke.”<sup>16</sup>

167         The Working Group agreed that it is difficult to define, in broad terms, what constitutes  
168 “critical factual material.” There is, as one member put it, “no blackletter answer.” Determining  
169 whether a particular record falls within this category can be highly case- and fact-intensive,  
170 turning on characteristics of the agency action, the process, and the material at issue—for  
171 example, whether the material is cited in *Federal Register* documents associated with the  
172 rulemaking. Although there is an extensive case law on this subject, it can be challenging to  
173 definitively generalize from those opinions which materials necessarily constitute “critical  
174 factual material.” As one member put it, what goes into the rulemaking docket is “not a legal  
175 question . . . but does have legal implications.” Access to expert counsel can be especially  
176 important for rulemaking personnel, especially those with less rulemaking experience.

177         One member of the Working Group suggested that rulemaking personnel should focus on  
178 whether public access to specific records is necessary to ensure meaningful public participation  
179 in the rulemaking. It may also be helpful for rulemaking personnel to build the public docket  
180 with an eye toward a potential, future administrative record for judicial review. In other words,  
181 rulemaking personnel should manage the public rulemaking docket to ensure the public has an  
182 opportunity to respond to those materials upon which the agency would likely rely to  
183 demonstrate to a reviewing court that its decision-making process was reasonable. Because  
184 agencies often incur a greater litigation risk when they exclude background factual materials  
185 from the public rulemaking docket, members of the Working Group noted that it may be worth  
186 erring on the side of overinclusion.

187         It is also worth noting that many background materials may be widely available  
188 independent of the public rulemaking docket, such as studies published in scholarly journals.  
189 Ready public access to a supporting material online or in print may obviate the need for inclusion  
190 in the docket. Many will also be copyright-protected. Agencies may wish to explain to

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<sup>16</sup> Recommendation 2013-4, *supra* note 2, ¶ 2.

191 rulemaking personnel when it is sufficient to include a reference or citation to materials that are  
192 sufficiently available elsewhere.

193 In other cases, especially for voluminous data underlying a proposed rule, it may be  
194 sufficient to reference relevant data in the preamble to a rule or instead add significant or  
195 aggregate data or a summary report to the docket rather than the entire dataset or database considered  
196 by the agency. Again, the appropriate course of action may depend on characteristics of the  
197 agency action, the process, and the data at issue. Agencies may wish to explain to rulemaking  
198 personnel how they should handle large datasets and databases in the public docket.

199 **h. Inter-Agency Communications**

200 Agency officials may receive solicited or unsolicited communications from officials at  
201 other federal agencies related to a rulemaking.

202 The most common inter-agency communications are those between the agency and  
203 OIRA. EO 12866, in particular, requires agencies to make certain inter-agency communications  
204 publicly available: “the substantive changes between the draft submitted to OIRA for review and  
205 the action subsequently announced,” “those changes in the regulatory action that were made at  
206 the suggestion or recommendation of OIRA,” and additional materials for significant regulatory  
207 agencies. Agencies may wish to explain to rulemaking personnel whether they should add these  
208 materials and other rulemaking-related communications with OIRA to the public rulemaking  
209 docket.

210 At some agencies, inter-agency communications are a routinized part of agency  
211 rulemaking. A Federal Communications Commission regulation governing the establishment of  
212 antenna farm areas, for example, requires the FCC to seek the advice of the Federal Aviation  
213 Administration (FAA) and add the FAA’s written response to the docket.<sup>17</sup> One member of the  
214 Working Group noted that a specific agency’s public rulemaking dockets routinely include  
215 documentation certifying that officials at certain other agencies have reviewed the proposed  
216 rules. Agencies for whom inter-agency communications are a routinized part of agency

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<sup>17</sup> 47 C.F.R. § 17.8(a).

217 rulemaking may wish to explain to rulemaking personnel whether and how they should record  
218 such communications in the public rulemaking docket.

219           Agencies sometimes receive communications from officials at other agencies through the  
220 formal process for public commenting. That agencies submit such communications through a  
221 public-facing comment process is a strong indicator that they should be, and are intended to be,  
222 made publicly available. As the Working Group discussed, rulemaking personnel typically add  
223 such communications to the public rulemaking docket as they would any comments received in  
224 the same manner from members of the general public.

225           Finally, rulemaking personnel may communicate with, or receive communications from,  
226 officials at other agencies in less formal ways. The Working Group agreed that whether such a  
227 communication belongs in the public rulemaking docket can be a difficult question and depends  
228 heavily on the nature and purpose of the specific communication and its effect on agency  
229 decision making. As one member of the Working Group put it, there can be a “fine line” between  
230 including and not including specific communications.

231           Interagency communications that strongly affect the “quality of the rulemaking” may be  
232 more appropriate for inclusion. Communications that are clearly pre-decisional and deliberative  
233 can be withheld from public inspection under the relevant FOIA exemption. Still, even when an  
234 agency has a legal right to exclude an inter-agency communication, it may be in the agency’s  
235 interest to add the communication to the public docket for policy or practical reasons, especially  
236 if the communication strongly influences or supports the agency’s action.

237           Agencies may wish to consider the distinction ACUS drew in Recommendation 80-6  
238 between communications containing “policy advice” and those containing “material factual  
239 information,” with disclosure more important for the latter than the former. Other characteristics  
240 counseling disclosure may include whether the communication reflects comments made by  
241 persons outside the government, or whether it is important to give public participants an  
242 adequate opportunity to respond “if the material presents new and important issues or creates  
243 serious conflicts of data.”<sup>18</sup>

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<sup>18</sup> Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86407 (Dec. 31, 1980).

244 **i. Draft Rules and Notices**

245 Unless a statute specifically directs an agency to do so, federal law does not require  
246 agencies to include draft proposed and final rules in public rulemaking dockets. (As noted above,  
247 EO 12866 separately requires that agencies disclose certain draft materials shared with or  
248 received from OIRA.) Drafts and other, similar intra-agency materials are frequently pre-  
249 decisional or deliberative records under FOIA. At least one agency’s rules permit, but do not  
250 require, officials to make draft proposed regulations and tentative final regulations available for  
251 public inspection.<sup>19</sup> Agencies, if any, that regularly include draft materials in the public  
252 rulemaking docket may wish to address their inclusion in guidance to rulemaking personnel.

253 **j. Rulemaking Petitions and Associated Materials**

254 The APA requires that agencies give interested persons “the right to petition for the  
255 issuance, amendment, or repeal of a rule.”<sup>20</sup> Although agencies have adopted different practices  
256 for rulemaking petitions, several have adopted rules directing personnel to make them available  
257 for public inspection or add them to the public docket for a related rulemaking.

258 ACUS has recommended that agencies use online dockets to allow the public to monitor  
259 the status of rulemaking petitions, consider inviting public comments on rulemaking petitions,  
260 and docket each decision with the petition to which it responds.<sup>21</sup>

261 Agencies may wish to explain to rulemaking personnel whether they should add  
262 rulemaking petitions and associated materials, including agency responses and responsive public  
263 comments, to the public docket for a related rulemaking.

264 **k. Advisory Committee Records, Reports, and Recommendations**

265 ACUS has recommended that agencies add “report or recommendations of any relevant  
266 advisory committees” to the public docket for related rulemakings.<sup>22</sup> Agencies may wish to

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<sup>19</sup> 21 C.F.R. § 10.40(f)(4), (6).

<sup>20</sup> 5 U.S.C. § 5539(e).

<sup>21</sup> Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014).

<sup>22</sup> Recommendation 2013-4, *supra* note 2, ¶ 2.

267 explain to rulemaking personnel which advisory committee materials, if any, they should add to  
268 the public docket for a related rulemaking.

269 **I. Records Specific to Multi-Member Boards and Commissions**

270 Agencies should consider, as appropriate, whether rulemaking staff should include  
271 materials associated with decision making by multi-member boards and commissions in the  
272 public rulemaking docket. Relevant materials may include voting records, transcripts, minutes,  
273 recordings, and notices required by the Government in the Sunshine Act.

274 **m. Indexes**

275 ACUS recommends that agencies “index public rulemaking dockets for informal  
276 rulemaking, at an appropriate level of detail.”<sup>23</sup> At least one agency, for a particular program,  
277 explicitly requires that public dockets contain an index of their contents.<sup>24</sup> Agencies may wish to  
278 explain to rulemaking personnel whether, and if so how, they should index public dockets.

279 **3. What Records Should Rulemaking Personnel Exclude From the Public Rulemaking**  
280 **Docket?**

281 Although ACUS has recommended that agencies “manage their public rulemaking  
282 dockets to achieve maximum public disclosure,” it has also recognized that some rulemaking  
283 materials may be “subject to legal limitations on disclosure, any claims of privilege, or any  
284 exclusions allowed by law that the agency chooses to invoke.”<sup>25</sup>

285 Members of the Working Group emphasized the difference between two types of  
286 exclusions. First, there is information that agencies *must* not disclose in the public rulemaking  
287 docket or otherwise, at least not without the consent of the information’s owner or the individual  
288 or entity to whom the information pertains. Second, there is information that agencies *may*  
289 choose not to disclose but are not prohibited from doing so and indeed may find it useful to  
290 disclose in the public rulemaking docket.

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<sup>23</sup> Recommendation 2013-4, *supra* note 2, ¶ 6.

<sup>24</sup> 40 C.F.R. § 155.32(b)(1), (c).

<sup>25</sup> Recommendation 2013-4, *supra* note 2, ¶ 2.

291 Information in the first category includes personal information,<sup>26</sup> confidential commercial  
292 information,<sup>27</sup> national security and other classified information, law enforcement records or  
293 information, and other, similar records enumerated in FOIA, the Privacy Act, the Trade Secrets  
294 Act, the Sunshine Act, and other statutes. These sorts of information may appear in documents  
295 generated or identified by agency officials, or they may appear in submissions received from  
296 members of the public. Some information, including personal information and confidential  
297 commercial information, can be disclosed with the consent of the information’s owner or the  
298 individual or entity to whom the information pertains. Agencies have adopted different methods  
299 to screen for protected materials or obtain consent to disclose them in the public docket—a  
300 subject the Working Group will consider in greater detail at its next meeting.

301 In some cases, it may be the form of the disclosure that is problematic. For example,  
302 while disclosing certain materials in the online docket may raise copyright concerns, it may be  
303 acceptable for an agency to provide limited access to the materials in its docket office. The  
304 Working Group will consider this subject at its next meeting as well.

305 Information in the second category includes materials subject to the deliberative-process,  
306 attorney-work-product, and attorney-client privileges recognized in civil litigation and FOIA  
307 section (b)(5). Although agencies may choose not to disclose such materials in the public  
308 rulemaking docket, they are not obligated to withhold them

309 Members of the Working Group emphasized that although agencies may *choose* not to  
310 add privileged materials to the public rulemaking docket, it is often in their interest to do so, in  
311 order to improve public participation in the rulemaking process and potentially as a defensive  
312 posture in case of future litigation. Agencies may wish to emphasize to rulemaking personnel  
313 that they should not universally exclude privileged materials from the public docket; they should  
314 instead consider the nature of specific information and its significance to the rulemaking. The  
315 Working Group also noted that rulemaking personnel should not blindly accept that documents

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<sup>26</sup> In this context, personal information means “information about an individual including his or her education, financial transactions, medical history, criminal or employment history, or similarly sensitive information, and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual.” *See* Admin. Conf. of the U.S., Recommendation 2020-2, *Protected Materials in Public Rulemaking Dockets*, 86 Fed. Reg. 6614 (Jan. 22, 2021).

<sup>27</sup> Confidential commercial information means “commercial information that is customarily kept private, or at least closely held, by the person or business providing it.” *See id.*

316 marked “privileged” or “confidential” should be excluded from the docket. They should instead  
317 consider the source of and purpose for the designation, and, as appropriate, independently  
318 consider whether the document should be included in the docket.

319 Agencies sometimes also exclude materials from the docket for procedural or pragmatic  
320 purposes. Some agencies, for example, exclude irrelevant and improperly submitted comments  
321 from the docket. As noted above, at least one agency allows rulemaking staff to exclude from the  
322 docket those documents associated with the rulemaking that are “generally accessible to the  
323 public in such a way that public notice and access are adequate (such as through widely available  
324 publications).”<sup>28</sup>

325 Some members of the Working Group asked whether it would be appropriate to exclude  
326 from the docket or redact content that is threatening, abusive, obscene, or profane. One member  
327 noted that Congress has paid some attention to the issue. The Senate Homeland Security  
328 Permanent Subcommittee on Investigations issued a staff report in October 2019 finding that  
329 agencies lack consistent policies regarding the screening and posting of comments containing  
330 profanity. Other docket management issues identified by the Subcommittee include publication  
331 of comments including copyrighted information, massive amounts of data irrelevant to the topic  
332 at hand, or executable files which may contain virus; publication of “thousands of duplicate or  
333 near-duplicate comments that make a docket difficult or impossible for the public to review the  
334 docket for substantive information;” and publication of comments submitted under false  
335 identities.<sup>29</sup> ACUS is also currently considering a project on best practices for handling mass,  
336 computer-generated, and fraudulent comments in rulemakings.<sup>30</sup>

337 The Working Group may wish to consider these issues in greater depth at its next  
338 meeting or in its final product.

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<sup>28</sup> Env'tl. Protection Agency, *EPA Action and Development Process: Creating and Managing Dockets: Frequently Asked Questions for EPA Action Developers*, at 21 (Oct. 2011).

<sup>29</sup> *Abuses of the Federal Notice-and-Comment Rulemaking Process*, STAFF OF S. PERM. SUBCOMM. ON INVESTIGATIONS (Oct. 2019), <https://www.portman.senate.gov/sites/default/files/2019-10/2019.10.24%20PSI%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf>. ACUS is currently undertaking a project to identify best practices for handling mass, computer-generated, and fraudulent comments. *Mass, Computer-Generated, and Fraudulent Comments*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/mass-computer-generated-and-fraudulent-comments> (visited Feb. 26, 2021).

<sup>30</sup> *Mass, Computer-Generated, and Fraudulent Comments*, Admin. Conf. of the U.S., <https://www.acus.gov/research-projects/mass-computer-generated-and-fraudulent-comments> (visited Mar. 11, 2021).

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

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

- 342 • What is the public rulemaking docket and what is its purpose?
- 343 • What materials should agency personnel add to the public rulemaking docket? Is  
344 there a general standard agency personnel should use to determine whether to add a  
345 material to the public rulemaking docket?
- 346 • What specific types of materials should agency personnel generally add or consider  
347 adding to the public rulemaking docket? Are there any specific types of materials for  
348 which agencies should provide special or more detailed guidance?
- 349 • What materials should agency personnel exclude from the public rulemaking docket?  
350 Is there a general standard agency personnel should use to determine whether to  
351 exclude a material from the public rulemaking docket?
- 352 • What specific types of materials should agency personnel generally exclude or  
353 consider excluding from the public rulemaking docket? Are there any specific types  
354 of materials for which agencies should provide special or more detailed guidance?
- 355 • How should agency personnel handle questions about whether or not to include  
356 specific records in the public rulemaking docket?