



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: March ~~15~~28, 2013

Re: Revised Draft Recommendation – Administrative Record project

The following draft recommendation is based on a draft report prepared by Leland E. Beck, Esq. entitled *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records*, as well as discussions of the Committee on Judicial Review at its March 19, 2013 public meeting. This draft recommendation is intended to facilitate the Committee's discussion at its ~~March 19~~April 03, 2013 public meeting, and not to preempt the Committee's discussion and consideration of any proposed recommendations. In keeping with the Conference's past practice, a draft preamble has also been included. The aim of the preamble is to explain the problem or issue the Recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

The Administrative Record in Informal Rulemaking

Draft Preamble

1 | The administrative record ~~is an essential part of~~plays an essential role in informing the
2 | public of potential agency action and in improving the public's ability to understand and
3 | participate in agency decisionmaking. As well, it can be essential to judicial review of agency
4 | decisionmaking under the Administrative Procedure Act (APA), which directs courts to "review
5 | the whole record or those parts of it cited by a party" to determine whether challenged agency
6 | action is lawful.¹ This statutory language was originally understood as referring to formal
7 | proceedings. However, the Supreme Court has long interpreted ~~the~~this APA provision as also

¹ 5 U.S.C. § 706.



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8 encompassing the “administrative record” in informal agency proceedings whether reviewable
9 by statute or as final agency actions under 5 U.S.C. § 704.² This application to informal
10 proceedings has given rise to uncertainty and experimentation as agencies and courts have
11 worked to implement the administrative record concept.—at times inconsistently. As a result,
12 there may well be public confusion about the distinctions between public rulemaking dockets,
13 administrative records, and certified administrative records for judicial review.

14 The Administrative Conference has therefore commissioned a study of federal agencies’
15 current practices in the development of public rulemaking dockets, administrative records, and
16 certified administrative records for purposes of judicial review.³ This recommendation and the
17 supporting Report address ~~the administrative record concept~~these concepts in the limited
18 context of informal agency rulemaking for legislative rules, adopted pursuant to procedures
19 prescribed in 5 U.S.C. § 553.—They⁴ The recommendation and the supporting Report do not
20 address the record for agency decisions made in other contexts, such as in adjudication, formal
21 rulemaking, or guidance documents, ~~adjudications, or formal rulemakings.~~

22 For the purposes of this recommendation, the administrative record, certified
23 administrative record, and public rulemaking docket are defined as follows:

24 “Administrative Record” means the full record of materials considered by the agency in
25 a rulemaking beginning no later than the date on which the agency publishes an advance notice
26 of proposed rulemaking, if there is one, or the notice of proposed rulemaking.⁵

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

³ Leland E. Beck, *Development, Compilation, and Judicial Review of Informal Agency Rulemaking Administrative Records* (DRAFT report to the Administrative Conference of the United States, forthcoming 2013) [hereinafter Beck Report].

⁴ 5 U.S.C. § 553(b)-(d).

⁵ The rulemaking process begins, according to a prior recommendation by the Administrative Conference, “no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.” Administrative Conference of the United States, Recommendation 93-4,



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27 “Certified Administrative Record” means the informal rulemaking record certified to a
28 court as the record on review of the agency’s regulatory action. The Certified Administrative
29 Record will also include an affidavit, made by a certifying official, attesting to the contents and
30 accuracy of the record being certified.⁶ Certified Administrative Records should also include an
31 index itemizing their contents.⁷

32 The “Public Rulemaking Docket” means the public rulemaking file managed by the
33 agency, regardless of location, such as online at Regulations.gov or an agency website or
34 available for physical review in a docket room. The Public Rulemaking Docket includes all
35 information that the agency has made available for public viewing. The Conference in the
36 ensuing recommendation urges agencies to manage their Public Rulemaking Dockets to achieve
37 maximum disclosure to the public. An agency best practice is to include in the Public
38 Rulemaking Docket information considered even after the termination of public comment
39 periods.

40 The Conference recognizes that agencies engage in informal rulemaking with differing
41 frequencies, resources, and technologies. Many agencies are in a period of transition, as they
42 move from paper to electronic recordkeeping. Attention to the design of information
43 technology resources that is mindful of the principles and best practices set forth below can aid
44 agencies in administrative recordkeeping and facilitate more effective judicial review. Similarly,
45 this guidance can aid agency personnel as they compile Administrative Records and increase
46 public understanding of agency decisionmaking.⁸

Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670 (Feb. 1, 1994), correction published, 59 Fed. Reg. 8507 (Feb. 12, 1994).

⁶ Beck Report, supra note 3, at Section IV.A.

⁷ Id.

⁸ The Administrative Conference has generally recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible. Administrative Conference of the United States, Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973).



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47 This recommendation builds upon important earlier Administrative Conference
48 workwork in the areas of rulemaking, recordkeeping, and technological developments in
49 managing records. Administrative Conference Recommendation 74-4, *Preenforcement Judicial*
50 *Review of Rules of General Applicability*, first identified the administrative materials that should
51 be before a court in evaluating, on preenforcement review, the factual basis for agency rules of
52 general applicability.⁹ The recommendation was directed, in part, at the judicial development
53 of a lexicon of administrative law terms, including “record”⁷ on review of informal agency
54 rulemakings.¹⁰ In Recommendation 93-4, *Improving the Environment for Agency Rulemaking*,
55 the Administrative Conference advised agencies to establish¹¹ and manage rulemaking files “so
56 maximum disclosure to the public is achieved during the comment period and so that a usable
57 and reliable file is available for purposes of judicial review.”¹² A number of Administrative
58 Conference recommendations also have examined the use of technology in acquiring, releasing,
59 and managing agency records.¹³ Most recently, the Conference examined legal considerations

⁹ Administrative Conference of the United States, Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974).

¹⁰ See Paul Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974) (based on consultant report prepared for the Administrative Conference).

~~¹¹ The rulemaking process begins, according to a prior recommendation by the Administrative Conference, “no later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.” Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4,670 (Feb. 1, 1994), correction published, 59 Fed. Reg. 8,507 (Feb. 12, 1994).~~

~~¹² *Id.* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4670 (Feb. 1, 1994), correction published, 59 Fed. Reg. 8507 (Feb. 12, 1994).~~

¹³ Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90-5, *Federal Agency Electronic Records Management and Archives*, 55 Fed. Reg. 53,270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 Fed. Reg. ~~5,209~~5209 (Feb. 2, 1989).



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60 associated with the use of digital technologies in the development and implementation of
61 informal rulemakings.¹⁴

62 ~~This~~The recommendation synthesizes and updates the ~~accompanying Report~~ examine
63 ~~the following issues~~ Conference's prior recommendations in ~~considering the administrative~~
64 ~~record in the context of informal rulemaking:~~

65 ~~*Contents of the Administrative Record.*~~ ~~In keeping with past recommendations and~~
66 ~~bearing in mind~~ these areas based on a thorough review of present agency disclosure
67 ~~obligations~~ practice. It also defines and clarifies key concepts. The recommendation is
68 grounded in applied empirical research, documented in the Report and ~~exemptions under the~~
69 ~~Freedom of Information Act,~~ supported by a survey questionnaire on agency recordkeeping
70 procedures as well as by the ~~need to protect sensitive information,~~ the collection of existing
71 agency guidance.¹⁵ ~~The~~ Conference has ~~examined the distinctions between agency public~~
72 ~~dockets~~ identified and ~~records, agency administrative records, and certified administrative~~
73 ~~records provided to federal courts on review of agency action.~~ ~~Although agencies and courts~~
74 ~~have taken varied approaches to defining the contents of the administrative record and the~~
75 ~~record on review, the Conference recommends that the administrative record include all~~
76 ~~materials considered by the agency during the informal rulemaking and that agencies manage~~
77 ~~their administrative records to achieve maximum disclosure to the public.~~ ~~The question of~~
78 ~~what has been considered has been addressed in prior recommendations and remains a matter~~
79 ~~of some discussion.~~

80 ~~An agency's administrative record in informal rulemaking should contain: i) all notices~~
81 ~~pertaining to the rulemaking and any documents referred to therein; ii) comments and other~~
82 ~~documents submitted to the agency; iii) any transcripts of oral presentations made in the~~
83 ~~course of a rulemaking; iv) reports of any advisory committees; v) copies or an index of all~~

¹⁴ Recommendation 2011-1, *supra*.

¹⁵ *Beck Report, supra* note 3, at Section III.



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84 ~~factual material, studies, and reports not included in the forgoing and considered by agency~~
85 ~~personnel in formulating the proposed or final rule; vi) any other material required by statute,~~
86 ~~executive order, or agency rule to be made public or considered in connection with the~~
87 ~~rulemaking; and vii) any other materials proffered by the agency as pertinent to the rule.~~

88 ~~Administrative best practices for all agencies in the areas of record compilation and~~
89 ~~indexing practices of federal agencies.~~ The Conference has considered best practices of
90 agencies in compiling and indexing administrative records, and recommends, to the extent
91 feasible, contemporaneous record compilation beginning no later than the date on which an
92 agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking,
93 whichever is earlier. Agencies should maximize opportunities to index their administrative
94 records on an ongoing basis and designate a record custodian for each rulemaking.

95 ~~Preservation of administrative records.~~ Expanding upon its earlier examination of
96 agency e-rulemaking records,¹⁶ the Conference has explored agency preservation of
97 administrative records, including the use of the Federal Document Management System, for
98 maintenance of agency files as permanent or temporary records.

99 ~~Certified administrative records for judicial review.~~ The Conference has considered the
100 availability of the certified record on review, including issues related to and certification,
101 inclusion of public records, submission to the court, supplementation, and availability of the
102 administrative record on review of federal agency action.

103 ~~Agency guidance on informal rulemaking records.~~ The Conference has reviewed existing
104 agency guidance on administrative record development and identified a number of common
105 and important issues addressed by agencies, many of which are ripe for elucidation given

¹⁶ Bridget C.E. Dooling, *Legal Issues in e-Rulemaking 31-32* (2011) (report to the Administrative Conference of the United States).



106 ~~varying agency practices.¹⁷—The Conference recommends that agencies issue guidance to aid~~
107 ~~personnel in compiling administrative records in accordance with these recommendations.~~

108 ~~This recommendation offers advice and best practices for all agencies, but the~~
109 ~~Conference recognizes that agencies engage in informal rulemaking with differing frequencies,~~
110 ~~resources, and technologies. Furthermore, the Conference recognizes that many agencies are~~
111 ~~in a period of transition, as they move from paper to electronic record keeping. Thoughtful~~
112 ~~attention to the design of information technology resources that is mindful of the principles~~
113 ~~and best practices set forth below can aid agencies in administrative recordkeeping and~~
114 ~~facilitate more effective judicial review.~~

[DRAFT] RECOMMENDATION

115 ~~The~~ *Administrative Record*

116 ~~1. — Agency Administrative Records.~~

117 ~~(a) — in Informal Rulemaking.~~ In the absence of a specific statutory requirement to
118 the contrary, the agency ~~administrative record in informal rulemaking~~ Administrative
119 Record should contain:

120 ~~1. — all materials considered by the agency during the informal rulemaking,~~
121 including:

122 (a) notices pertaining to the rulemaking ~~and any documents referred to therein;~~

123 ~~(a)(b)~~ (b) comments and other documents submitted to the agency related to the
124 rulemaking;

¹⁷ ~~The Administrative Conference has generally recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible. Administrative Conference of the United States, Recommendation 71-3, *Articulation of Agency Policies*, 38 Fed. Reg. 19,788 (July 23, 1973).~~



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125 (c) any factual materials not included in the foregoing;

126 ~~(a)(d)~~ transcripts of oral presentations made in the course of a rulemaking;

127 ~~(a)(e)~~ reports or recommendations of any relevant advisory committees;

128 ~~v. copies or an index of all factual material, studies, and reports not~~

129 ~~included in the foregoing and considered by agency personnel in formulating the~~

130 ~~proposed or final rule;~~

131 ~~(a)(f)~~ any other materials required by statute, executive order, or agency rule

132 to be considered or to be made public ~~or considered~~ in connection with the rulemaking;

133 and

134 ~~(a)(g)~~ any other materials ~~proffered~~ considered by the agency as pertinent to the rule.

135 ~~(b) Public Rulemaking Docket.~~ Agencies should manage their administrative

136 ~~records~~ Public Rulemaking Dockets to achieve maximum public disclosure. Insofar as

137 feasible, but subject to the public.

138 2. The legal limitations on disclosure, the Public Rulemaking Docket should include

139 all materials in the Administrative Record ~~certified.~~

140 ~~2.3.~~ Certified Administrative Record. The Certified Administrative Record provided to

141 the court on judicial review of informal rulemaking should contain all of the materials in the

142 ~~administrative record~~ Administrative Record as set forth in Recommendation ~~One, subpart a1,~~

143 except: materials for which disclosure is prohibited or that are otherwise protected from

144 disclosure by law and which are not presented under seal; and materials that the agency has

145 determined are subject to withholding on the basis of legal privilege in the forum for review,

146 and that it sees fit to withhold. ~~The Conference does not assume that~~ However, the reviewing

147 court should not invariably be confined to the foregoing materials in evaluating the factual

148 basis for the rule. The record on review may—consistent with the Administrative Procedure



149 Act, 5 U.S.C. § 706, and as appropriate under the rules of the reviewing court—also consist of
150 those parts of the Certified Administrative Record cited by a party.

151 **Compiling and Indexing the Administrative Record**

152 ~~3.4. Agencies should customarily compile administrative records contemporaneously~~
153 ~~with an informal rulemaking proceeding rather than after signature by the designated agency~~
154 ~~official or the rule is challenged in federal court, unless limited resources or risk evaluation~~
155 ~~weigh against the practice.—~~ Agencies should begin compiling ~~administrative records~~
156 ~~not~~Administrative Records no later than the date on which an agency publishes an advance
157 notice of proposed rulemaking, if there is one, or a notice of proposed rulemaking, ~~whichever is~~
158 ~~earlier.~~

159 ~~4.5.~~ Agencies should maximize opportunities to index ~~administrative~~
160 ~~records~~Administrative Records for informal rulemaking on an ongoing basis, at an appropriate
161 level of detail, and consistent with privilege and Freedom of Information Act indexing practices.

162 ~~5.6.~~ Agencies should designate a custodian or custodians for administrative
163 recordkeeping, either on a rulemaking by rulemaking basis, ~~when administrative records in an~~
164 ~~informal rulemaking are compiled contemporaneously, as well as for preparation of a certified~~
165 ~~administrative record in the event of judicial review of an agency rule or generally.~~ Agencies
166 should inform agency personnel of the custodian(s) and direct them to deposit materials
167 considered during the rulemaking with the custodian(s). The custodian(s) should document the
168 record compilation process.

169 **Preserving Administrative Records**

170 ~~6.7.~~ The National Archives and Records Administration (NARA) should consider
171 amending its agency guidance to specifically indicate the legal value of records relating to the
172 promulgation of legislative rules, particularly ~~certified—administrative—records~~Certified
173 Administrative Records.



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174 | ~~7.8.~~ Agencies using electronic records management systems to manage rulemaking
175 | records, such as the Federal Document Management System or agency specific systems, should
176 | work with NARA to ensure the adequacy of such systems for archival purposes and the
177 | transferability of permanent records to the National Archives. Agencies should consider
178 | whether revision of their records schedules is appropriate in light of developments in electronic
179 | records management.

180 | **Certified~~Certifying~~ Administrative Records**~~and Judicial Review~~

181 | ~~8.9.~~ Agencies should develop procedures for designating appropriate individuals,
182 | who may or may not be record custodians, to certify ~~rulemaking records~~Certified
183 | Administrative Records to the court in case of judicial review of agency action. ~~The~~
184 | ~~agency~~Agency certifications should include an index of content. Agency certifications should
185 | briefly ~~and generally~~ describe exclusions of Administrative Record material from the
186 | ~~administrative record in its certification to the court~~Certified Administrative Record, if any.

187 | **Agency Guidance on Informal Rulemaking Administrative Records**

188 | ~~9.10. Subject to resources, agencies~~Agencies that engage in informal rulemaking
189 | should ~~prepare~~issue guidance to aid personnel in implementing the above best practices~~above~~.
190 | Agencies should make their guidance on informal rulemaking administrative
191 | ~~records~~recordkeeping available to the public and to the Department of Justice, if the
192 | Department represents them in litigation. The level of detail and contents of such guidance will
193 | naturally vary based on factors such as: the size of typical agency rulemaking records;
194 | institutional experience, or the lack thereof, with record compilation and ~~on the record~~informal
195 | rulemaking litigation; the need for consistency across agency components in the development
196 | and maintenance of rulemaking records; and agency resources. However, agencies should
197 | ensure that guidance addresses at least the following:



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198 (a) essential components of the ~~administrative record and the certified~~
199 ~~administrative record~~; Public Rulemaking Docket, the Administrative Record, and the
200 Certified Administrative Record;

201 (b) appropriate exclusions from the Administrative Record, including guidance on
202 whether and when to exclude files such as personal notes or draft documents;

203 ~~(b)~~(c) timing of ~~administrative record~~Administrative Record compilation and indexing
204 practices;

205 ~~(c) identification of types of documents that might be excluded from the public~~
206 ~~docket or certified administrative record (e.g., privileged materials, confidential~~
207 ~~information protected from disclosure by statute or regulation, information not relied~~
208 ~~upon, etc.);~~

209 (d) management and segregation of sensitive or protected materials, e.g.,
210 copyrighted, classified, protected personal, or confidential business information;

211 (e) management and segregation of privileged materials, e.g., attorney work
212 product, or pre-decisional deliberative materials;

213 ~~(d)~~(f) preservation of ~~administrative records~~Administrative Records; and

214 ~~(e)~~(g) certification of the record on review, including the process for identifying the
215 appropriate certifying official.

216 If relevant, agency guidance should ~~also discuss~~include:

217 ~~(f)~~(h) capabilities and limitations of recordkeeping tools and technologies; and

218 ~~(g)~~(i) ~~available~~ policies and procedures for the protection of sensitive information
219 submitted by the public during the process of rulemaking or otherwise contained in the
220 ~~administrative record~~.Administrative Record.