



## Protected Materials in Public Rulemaking Dockets

### Committee on Rulemaking

#### Proposed Recommendation for Committee | August 18, 2020

#### Commented [TR1]:

*Note for Committee:* At the last meeting, the Committee discussed a few broad questions that went to the overall scope of the recommendation. We've briefly noted each of these points below and offered some background information for the Committee's consideration. The ACUS staff will revise the Preamble prior to the third meeting (on August 31) to clarify each of these three points, and the Committee should bear these points in mind while revising the text of the enumerated recommendations at its second (August 18) meeting.

(1) The scope of the project is explicitly limited to protecting personal information and confidential commercial information—other types of protected information, such as national security information, are beyond the scope of the project (and were not addressed in the underlying research). The Preamble will be clarified so that it more explicitly captures this scope.

(2) The scope of the project also is limited to addressing procedures for protecting materials that the agencies deem to be protected. The project is not intended to offer recommendations on what is or is not a protected material, though it will offer some illustrative examples of materials that are often protected as background information in the Preamble.

(3) The Preamble will be amended to clarify the distinction between materials that agencies are legally required to withhold (under the Privacy, Trade Secrets Act, or some other source of law) and those that they are merely permitted but not otherwise required to withhold (e.g., those that may fall under a FOIA exemption but may not be subject to another other prohibition on disclosure).

1 The Administrative Conference has issued several recommendations to help agencies  
2 balance the competing considerations of transparency and confidentiality in managing their  
3 rulemaking dockets.<sup>1</sup> This project builds on these recommendations. It provides greater  
4 specificity to agencies on how they should handle rulemaking materials they determine should be  
5 withheld to protect sensitive business or personal information, notwithstanding any  
6 countervailing benefits of disclosure (hereinafter “protected material”).

7 As part of the rulemaking process, an agency creates a public rulemaking docket, which  
8 consists of all rulemaking materials the agency has: (1) proactively published online or (2) made  
9 available for public inspection in a reading room. Public rulemaking dockets include materials  
10 agencies generate themselves and comments agencies receive from the public. Broadly speaking,  
11 public rulemaking dockets serve three purposes: providing the public with the information the  
12 agency considered in a rulemaking, providing courts with a record for evaluating challenges to  
13 the rule, and satisfying agency recordkeeping requirements.

<sup>1</sup> Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, advises agencies to allow submitters to flag confidential information, including trade secrets, and advises agencies to devise procedures for reviewing and handling such information. Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Issues in e-Rulemaking*, ¶ 1, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, the *Administrative Record in Informal Rulemaking*, advises agencies to develop guidance on managing and segregating protected information, such as confidential commercial information and sensitive personal information, while disclosing non-protected materials. Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, ¶11, 78 Fed. Reg. 41,358, 41,361 (July 10, 2013). See also Admin. Conf. of the U.S., Recommendation 89-7, *Federal Regulation of Biotechnology*, 54 Fed. Reg. 53,494 (Dec. 29, 1988); Admin. Conf. of the U.S., Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,408 (Dec. 31, 1980).



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14 Currently, agencies accept public comments for their public rulemaking dockets through  
15 Regulations.gov and their own websites. Regulations.gov and agency websites that accept  
16 comments expressly notify the public that the agency may publish the information it receives.<sup>2</sup>  
17 When a person submits a comment to an agency, however, the agency does not immediately  
18 publish the comment. Instead, agencies take time to review comments before publishing them.  
19 Most agencies perform at least some kind of screening during this period.

20 Agencies perform this screening because, in maintaining their public rulemaking dockets,  
21 they confront competing considerations of transparency and confidentiality. On the transparency  
22 side, the Freedom of Information Act (FOIA) presumes disclosure of information requested by a  
23 member of the public, subject to certain exceptions described below. And the *Portland Cement*  
24 doctrine requires agencies to make publicly available the critical information — including  
25 technical studies, staff reports, data, and methodologies — underlying proposed rules.<sup>3</sup>

26 But agencies often receive materials during rulemaking for which the law authorizes  
27 withholding because of their content. For example, one of FOIA's exemptions, called  
28 "Exemption 6," covers "personnel and medical files and other similar files the disclosure of  
29 which would constitute an unwarranted invasion of privacy."<sup>4</sup> "Similar files" means any  
30 information about a person, such as a name, address, or occupation, that can be used to identify  
31 the person.<sup>5</sup> In deciding whether Exemption 6 applies, courts determine whether disclosure  
32 would constitute a "clearly unwarranted invasion of personal privacy."<sup>6</sup> In making this  
33 determination, they balance the privacy interests of the person to whom the information pertains  
34 against society's interest in learning about governmental processes. Privacy interests are greatest

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<sup>2</sup> See Christopher Yoo, Protected Materials in Public Rulemaking Dockets 24 (Mar. 10, 2020) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-report-protected-materials-public-rulemaking-dockets>.

<sup>3</sup> See *Portland Cement v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

<sup>4</sup> 5 U.S.C. § 552(b)(6).

<sup>5</sup> See *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014).

<sup>6</sup> See *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 361 (5th Cir. 2001).



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35 when the projected harm from disclosure of the information includes identity theft and fraud.<sup>7</sup>  
36 Privacy interests are minimal when a person has consented to the agency disclosing his or her  
37 information. If an agency encounters information that falls under Exemption 6, FOIA authorizes  
38 the agency to exclude it from the public rulemaking docket.

39 Another FOIA exemption, called “Exemption 4,” covers “trade secrets and commercial  
40 or financial information obtained from an individual and confidential.”<sup>8</sup> Information is  
41 “confidential” within the meaning of Exemption 4 if it is “customarily . . . kept private or closely  
42 held by the submitter” and the government has given some assurance to the submitter, either  
43 explicitly or implicitly, that the information will not be publicly disclosed.<sup>9</sup> The  
44 Recommendation refers to these materials collectively as “confidential commercial information.”  
45 An agency can assure a submitter that confidential commercial information will not be publicly  
46 disclosed by, for example, directly communicating to the submitter an intent to not disclose his  
47 or her confidential commercial information, posting a general notice informing submitters that  
48 their confidential commercial information will not be disclosed, or engaging in an established  
49 practice of not disclosing confidential commercial information.<sup>10</sup> FOIA authorizes agencies to  
50 exclude from their public rulemaking dockets information falling under Exemption 4.

51 There are three categories of material that agencies generally consider to be “protected  
52 materials.”<sup>11</sup> The first is unique identification numbers, either of submitters themselves or of  
53 third parties, that create a high risk of identity theft if disclosed. This category includes social  
54 security numbers, bank account numbers, and passport numbers. The second category consists of  
55 two kinds of information: information about the submitter submitted to the agency accidentally,

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<sup>7</sup> See *id.* at 364.

<sup>8</sup> 5 U.S.C. § 552(b)(4).

<sup>9</sup> See *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2361 (2019).

<sup>10</sup> See OFFICE OF INFORMATION POLICY, DEP’T OF JUSTICE, EXEMPTION 4 AFTER THE SUPREME COURT’S RULING IN *FOOD MARKETING INSTITUTE V. ARGUS LEADER MEDIA* (Oct. 4, 2019), <https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media>.

<sup>11</sup> See *Yoo*, *supra* note 2, at 104, 124–26.



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56 and information pertaining to someone other than the submitter. Information within this category  
57 includes names, email addresses, physical addresses, medical information, and so on. The final  
58 category consists of confidential commercial information provided to the agency under an  
59 assurance of protection from disclosure. Courts have generally authorized agencies to withhold  
60 materials in all three of these categories under FOIA Exemptions 4 and 6.<sup>12</sup>

61 This Recommendation prescribes steps agencies can take to exclude from their public  
62 rulemaking dockets protected material while still providing the public with the information upon  
63 which the agency relied in formulating the proposed rule. These steps include, among others,  
64 aggregating the data, which means delinking the data from the individuals to whom the data  
65 belong and then presenting the data in a summarized form, such as a median. The  
66 Recommendation also identifies resources that can help agencies implement the principle of  
67 excluding from their public rulemaking dockets protected material while still providing the  
68 public with the information upon which the agency relied in formulating the proposed rule.

### **RECOMMENDATION**

#### **Including Notifications for Members of the Public Before They Submit Comments or Otherwise Take Part in Rulemaking**

- 69 1. Agencies should decide which classes of rulemaking materials should be withheld to  
70 protect sensitive business or personal information, notwithstanding any countervailing  
71 public benefits of disclosure (hereinafter “protected material”). In making this decision,  
72 agencies should be aware that other agencies generally deem the following classes of  
73 material to be protected material:
- 74 a. Unique identification numbers including social security numbers, bank account  
75 numbers, and passport numbers;

**Commented [TR2]:** At the Committee’s request, the numbered Paragraphs have been reordered as follows. Paragraphs 2 and 3 below were originally Paragraphs 13 and 14. Paragraphs 11 through 13 below were originally Paragraphs 2 through 4.

<sup>12</sup> See, e.g., *Taitz v. Astrue*, 806 F. Supp. 2d 214, 220 (D.D.C. 2011) (authorizing, under Exemption 6, withholding of social security numbers); *Schoenman v. FBI*, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (authorizing, under Exemption 6, withholding of information pertaining to third parties); *Food Marketing Inst.*, 139 S. Ct. at 2361 (authorizing, under Exemption 4, withholding of confidential commercial information provided to the agency under an assurance of protection from disclosure).



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- 76 b. Names, email addresses, physical addresses, incomes, medical information, and
- 77 other kinds of personal information inadvertently submitted by the commenter or
- 78 that pertain to third parties; and
- 79 c. Confidential commercial information provided to an agency under the agency's
- 80 assurances of protection from disclosure.
- 81 2. To reduce the risk that agencies will inadvertently disclose protected material in
- 82 connection with rulemakings, agencies should clearly notify the public about their
- 83 treatment of protected material. An agency's notifications should:
  - 84 a. Inform members of the public that all comments submitted are subject to
  - 85 public disclosure;
  - 86 b. Instruct members of the public how they can submit comments anonymously,
  - 87 for example, by writing "Anonymous" in the name field on the online
  - 88 comment platform or by leaving the name field blank;
  - 89 c. Inform members of the public what weight, if any, the agency accords
  - 90 comments that are submitted anonymously;
  - 91 d. Inform members of the public whether the agency offers assurances of
  - 92 protection from disclosure for their confidential commercial information and
  - 93 if so, how to identify such information for the agency;
  - 94 e. Instruct members of the public never to submit unique identification numbers
  - 95 such as social security numbers and other kinds of personal or confidential
  - 96 commercial information that pertain to third parties, such as medical
  - 97 information and trade secrets;
  - 98 f. Advise members of the public to review their comments for the material
  - 99 identified above in e. and, if they find such material, to remove it;
  - 100 g. Inform members of the public that they may request, during the period
  - 101 between when a comment is received and when it is made public, that
  - 102 personal information they inadvertently submitted be withheld;
  - 103 h. Inform members of the public that they may request, after the agency has
  - 104 published any comment, that personal or confidential commercial information

**Commented [TR3]:** ACUS staff proposes moving this language to the Preamble and combining/reconciling it with language at 51-60.

**Commented [TR4]:** Adam J. White suggested a recommendation that encourages agencies, or perhaps the General Services Administration (GSA), to create a box that a member of the public could check to indicate that he or she is submitting confidential commercial information or personal information.

**Commented [TR5]:** The Committee began discussion of b. and c. last meeting, but did not reach a resolution. We informed the Committee that another ACUS project, titled *Mass, Computer-Generated, and Fraudulent Comments* is addressing the topic of anonymous comments and that we would provide the Committee with a description of that project as it relates to this topic. That description appears below:

One of the key issues addressed in the *Mass, Computer-Generated, and Fraudulent Comments* project will be whether or not the identity of the commenter matters, as it bears on whether or not agencies are likely to see mass, computer-generated, or fraudulent comments as a problem. The research team will therefore be interviewing agencies about whether or not they allow anonymous comments and, if so, whether and how those comments are treated differently from other comments. The project report and recommendation may ultimately contain one or more recommendations relating to anonymous comments insofar as they are relevant to agencies' efforts to address mass, computer-generated, and fraudulent comments.



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- 105           pertaining to themselves or to their dependents within the comment be  
106           removed from public exposure; and
- 107           i. Inform members of the public that the agency reserves the right to redact or  
108           aggregate any part of a comment if the agency determines that it constitutes  
109           protected material, or may withhold a comment in its entirety if it determines  
110           that redaction or aggregation would insufficiently prevent the disclosure of  
111           this information.
- 112           3. An agency should include the notifications described in Paragraph 2 in at least the  
113           following places:
- 114           a. Within the rulemaking document upon which the agency requests comments, such  
115           as a notice of proposed rulemaking or an advanced notice of proposed  
116           rulemaking;
- 117           b. Within the online comment submission form on Regulations.gov, or, if the agency  
118           does not participate in Regulations.gov, on the agency’s own comment  
119           submission form;
- 120           c. Within any automatic emails that an agency sends acknowledging receipt of a  
121           comment;
- 122           d. On any part of the agency’s website that describes its rulemaking process; and  
123           e. Within any notices of public meetings pertaining to the rule.

**Deciding Whether To Offer Assurances of Protection from Disclosure For  
Confidential Commercial Information**

- 124           4. Agencies should recognize that there may be instances in which businesses want to  
125           submit confidential commercial information, such as trade secrets, to inform the  
126           agencies’ rulemaking efforts, but do not want such information to be made publicly  
127           available. Agencies should decide whether they will offer assurances of protection from

**Commented [TR6]:** During the first Committee meeting, Rebecca D. Orban (U.S. Coast Guard) suggested that this recommendation may be better directed to GSA than to agencies. The Committee bracketed it for further discussion during the next meeting.

**Commented [TR7]:** During the first Committee meeting, Ms. Orban suggested that this recommendation may be better directed to GSA than to agencies. She also suggested the option of a pop-up notification to commenters, in addition to automated emails. The Committee bracketed it for further during the next meeting discussion.



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- 128 disclosure for confidential commercial information. Factors that weigh in favor of  
129 offering assurances of protection from disclosure include:
- 130 a. The agency has the resources to identify and withhold confidential  
131 commercial information;
  - 132 b. The agency receives a high volume of requests for protected treatment of  
133 confidential commercial information;
  - 134 c. The agency's rulemaking efforts can benefit from the agency's review of  
135 confidential commercial information; and
  - 136 d. The agency can identify no substitute for confidential commercial information  
137 that would inform its rulemaking in a comparable manner.
- 138 5. Agencies that choose to offer assurances of protection from disclosure for confidential  
139 commercial information should decide how they will offer them. Agencies can choose to  
140 inform submitters, directly upon submission, that they will accord confidential  
141 commercial information protected treatment; post a general notice informing submitters  
142 that confidential commercial information will be accorded protected treatment; or both.
- 143 6. Agencies that choose to offer assurances of protection from disclosure for confidential  
144 commercial information should adopt policies to help them identify such information.  
145 Agencies should consider including the following, either in tandem or as alternatives, as  
146 part of their policies:
- 147 a. Instructing submitters to write the word "Private," "Protected," or similar  
148 language within the header of their submissions that contain confidential  
149 commercial information;
  - 150 b. Instructing submitters to flag the particular text within the comment that  
151 constitutes confidential commercial information; and
  - 152 c. Instructing submitters to submit both redacted and unredacted versions of a  
153 comment that contains confidential commercial information.
- 154 7. Agencies that choose to accord protected treatment for confidential commercial  
155 information should withhold such material, using the techniques described in Paragraph  
156 11 as appropriate.



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### **Allowing Submitters to Notify the Agency of Material They Inadvertently Submitted**

- 157 8. Agencies should give submitters an opportunity to alert relevant agency officials to any  
158 personal information they inadvertently included in their comments.  
159 9. Agencies should ensure that the personal information submitters have identified as  
160 inadvertently submitted is not publicly disclosed, or, if already disclosed, is removed as  
161 promptly as possible.

### **Allowing People to Notify the Agency, After the Agency Publishes the Comment, of Personal and Confidential Commercial Information They Want Removed**

- 162 10. Agencies should allow people to request that personal or confidential commercial  
163 information pertaining to themselves or a dependent within the comment be removed  
164 from public exposure. Agencies should review such requests and, upon determining that  
165 the information subject to the request is, in fact, personal or confidential commercial  
166 information, they should take all steps necessary to so remove it.

### **Screening Comments for Protected Material and Protecting Such Material from Disclosure**

- 169 11. Agencies should screen comments for protected material. If, when screening, an agency  
170 determines that a comment contains:
- 171 a. *Isolated instances of protected material*, the agency should redact that material  
172 and publish the rest of the comment. Redaction should be thorough enough to  
173 prevent a person from discerning the redacted information, but not so broad as to  
174 prevent the public from viewing non-protected material;
  - 175 b. *Protected material pertaining to a large number of people*, the agency should  
176 delink the data from the individuals to whom the data belong and present the data  
177 in a summarized form, such as an average (hereinafter “aggregation”). Agencies  
178 should work with data science experts and others in relevant disciplines to ensure





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179 that aggregation is thorough enough to prevent someone from disaggregating the  
180 data (i.e., linking the aggregated data with any person).

181 12. If redaction and aggregation would still permit a member of the public to identify the  
182 redacted material, or disaggregate the aggregated material, the agency should withhold  
183 the comment in its entirety.

184 13. Agencies should explore using a variety of computer-based tools to aid in their  
185 identification of protected material. This exploration should include speaking with private  
186 sector experts and technology-focused agencies such as the General Services  
187 Administration's Technology Transformation Service and the Office of Management and  
188 Budget's United States Digital Service to determine which tools are most appropriate and  
189 how they can be best deployed given the agencies' resources.

### **Describing Material an Agency Has Withheld**

190 14. When agencies withhold from public disclosure personal or confidential commercial  
191 information they have received from the public in connection with a rulemaking and on  
192 which they have relied in formulating rules, they should describe the withheld material in  
193 as much detail as possible without compromising its confidentiality. In doing so, agencies  
194 should consider preparing explanatory staff or technical reports and should publish these  
195 reports on the parts of their websites that describe their rulemaking processes and within  
196 the preambles to final rules.