



Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation for Committee | August 1831, 2020

1 As part of the rulemaking process, an agency creates a public rulemaking docket, which
2 consists of all rulemaking materials the agency has: (1) proactively published online or (2) made
3 available for public inspection in a reading room. Public rulemaking dockets include materials
4 agencies generate themselves and comments agencies receive from the public. ~~Broadly speaking,~~
5 ~~public rulemaking dockets serve three purposes: providing the public with the information the~~
6 ~~agency considered in a rulemaking, providing courts with a record for evaluating challenges to~~
7 ~~the rule, and satisfying agency recordkeeping requirements. Their purpose is to provide the public~~
8 ~~with the information that informed the agency's rulemaking.~~¹

Commented [TR1]: Changed per Andrew Simons' (EPA) published comment (8 18 2020).

9 The Administrative Conference has issued several recommendations to help agencies
10 balance the competing considerations of transparency and confidentiality in managing their
11 rulemaking dockets.² This project builds on these recommendations. ~~It specifies how agencies~~

¹ ~~The public rulemaking docket is distinguished from the "the administrative record for judicial review," which is intended to provide courts with a record for evaluating challenges to the rule and the "rulemaking record," which consists of the public rulemaking docket and the administrative record for judicial review combined. See Admin. Conf. of the U.S., Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).~~

² 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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 should handle rulemaking materials they determine should be withheld to protect personal and
13 confidential commercial information (hereinafter “protected material”), notwithstanding any
14 countervailing benefits of disclosure.

Commented [TR2]: ACUS staff flags this definition of “protected material” for Committee discussion.

15 The scope of the Recommendation is explicitly limited to protecting personal information
16 and confidential commercial information. Other types of protected information, such as national
17 security information and copyrighted materials, are beyond the Recommendation’s scope. The
18 Recommendation is also limited to addressing procedures for protecting materials that agencies
19 decide warrant protection. The Recommendation is not intended to offer suggestions on what is
20 or is not a protected material.

21 Though not intended as an exhaustive list, the following types of information typically
22 qualify as “protected materials” in most agencies. One category of protected materials covers
23 unique identification numbers, either of submitters themselves or of third parties, that create a
24 high risk of identity theft if disclosed. This category includes social security numbers, bank
25 account numbers, and passport numbers. The secondAnother category consists of two kinds of
26 personal information: information about the submitter submitted to the agency accidentally, and
27 information pertaining to someone other than the submitter. Information within this category
28 includes names, email addresses, physical addresses, medical information, and so on. The finalA
29 third category consists of confidential commercial information provided to the agency under an
30 assurance of protection from disclosure. Currently, agencies accept public comments for their
31 public rulemaking dockets through Regulations.gov and their own websites. Regulations.gov and
32 agency websites that accept comments expressly notify the public that the agency may publish
33 the information it receives.³ When a person submits a comment to an agency, however, the
34 agency does not immediately publish the comment. Instead, the agency takes time to review
35 comments before publishing them. Most agencies perform at least some kind of screening during
36 this period.

Commented [TR3]: Margy O’Herron (DOJ), in her published comment (8/26/2020), writes: “the three types of information described do not cover all of the information that agencies generally must protect. Although I acknowledge the comment indicating that the project will not define what is or is not protected material, omitting categories of information that are protected could be misleading. For example, the term ‘unique identification numbers’ on line [20] is much narrower than the definition of a record in the Privacy Act, which defines a protected record as ‘any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.’ 5 U.S.C. 522a(a)(4). Similarly, limiting personally identifiable information such as names and addresses to ‘accidentally’ submitted information (line [23]) suggests a narrower definition.”

³ 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>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

[A revised legal analysis section will appear here. It will cover very briefly:

- I. General obligations to disclose information underlying rules under the Administrative Procedure Act and the D.C. Circuit’s current interpretation thereof;
- II. Legal obligations to withhold certain materials under the Privacy Act and the Trade Secrets Act; and
- III. Exceptions to the Privacy Act for materials required to be released under FOIA and exceptions to the Trade Secrets Act for materials authorized by law to be disclosed]

This Recommendation prescribes steps agencies can take to exclude from their public rulemaking dockets protected material while still providing the public with the information upon which ~~the agency~~agencies relied in formulating the proposed rule.⁴ These steps include, among others, aggregating the data, which means delinking the data from the individuals to whom the data belong and then presenting the data in a summarized form, such as a median. The Recommendation also identifies resources that can help agencies implement the principle of excluding from their public rulemaking dockets protected material while still providing the 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

1. Agencies should decide which classes of rulemaking materials should be withheld to protect sensitive business or personal or confidential commercial information (hereinafter “protected material”), notwithstanding any countervailing public benefits of disclosure (hereinafter “protected material”). ~~In making this decision, agencies should be aware that other agencies generally deem the following classes of material to be protected material:~~

Commented [TR4]: ACUS staff flags this definition of “protected material” for Committee discussion.

⁴ Although some agencies permit the submission of anonymous and pseudonymous comments as a way of protecting personal material, the issue of anonymous and pseudonymous comments raises a number of legal and policy questions that are beyond the scope of this Recommendation. Accordingly, this Recommendation does not address the submission of anonymous and pseudonymous comments as a means of protecting personal information.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- ~~a. Unique identification numbers including social security numbers, bank account numbers, and passport numbers;~~
- ~~b. Names, email addresses, physical addresses, incomes, medical information, and other kinds of personal information inadvertently submitted by the commenter or that pertain to third parties; and~~
- ~~e. Confidential commercial information provided to an agency under the agency's assurances of protection from disclosure.~~

2. To reduce the risk that agencies will inadvertently disclose protected material in connection with rulemakings, agencies should clearly notify the public about their treatment of protected material. An agency's notifications should:

- a. Inform members of the public that ~~all~~ comments ~~submitted~~ are generally subject to public disclosure, except when disclosure is limited by law;
- ~~b. Instruct members of the public how they can submit comments anonymously, for example, by writing "Anonymous" in the name field on the online comment platform or by leaving the name field blank;~~
- ~~e. Inform members of the public what weight, if any, the agency accords comments that are submitted anonymously;~~
- d.b. Inform members of the public whether the agency offers assurances of protection from disclosure for their confidential commercial information and if so, how to identify such information for the agency;
- e.c. Instruct members of the public never to submit unique identification numbers such as social security numbers and other kinds of personal or confidential commercial information that pertain to third parties, such as medical information and trade secrets;
- f.d. Advise members of the public to review their comments for the material identified above in ec. and, if they find such material, to remove it;
- g.e. Inform members of the public that they may request, during the period between when a comment is received and when it is made public, that personal information they inadvertently submitted be withheld;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

86 h.f. Inform members of the public that they may request, after the agency has
87 published any comment, that personal or confidential commercial information
88 pertaining to themselves or to their dependents within the comment be
89 removed from public exposure; and

90 i.g. Inform members of the public that the agency reserves the right to redact or
91 aggregate any part of a comment if the agency determines that it constitutes
92 protected material, or may withhold a comment in its entirety if it determines
93 that redaction or aggregation would insufficiently prevent the disclosure of
94 this information.

- 95 3. An agency should include the notifications described in Paragraph 2, or a link to those
96 notifications, in at least the following places:
- 97 a. Within the rulemaking document upon which the agency requests comments, such
98 as a notice of proposed rulemaking or an advanced notice of proposed
99 rulemaking;
 - 100 b. ~~Within the online comment submission form on Regulations.gov, or, if the agency~~
101 ~~does not participate in Regulations.gov, on~~On the agency's own comment
102 submission form, if the agency has one;
 - 103 c. Within any automatic emails that an agency sends acknowledging receipt of a
104 comment;
 - 105 d. On any part of the agency's website that describes its rulemaking process; and
 - 106 e. Within any notices of public meetings pertaining to the rule.

107 4. The General Services Administration's eRulemaking Program Management Office
108 should work with those agencies that participate in Regulations.gov to include the
109 notifications described in Paragraph 2 within any automated emails that Regulations.gov



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

110 ~~sends acknowledging receipt of a comment and on relevant parts of the Regulations.gov~~
111 ~~website.~~

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

- 112 ~~4. Agencies should recognize that there may be instances in which businesses want to~~
113 ~~submit confidential commercial information, such as trade secrets, to inform the~~
114 ~~agencies' rulemaking efforts, but do not want such information to be made publicly~~
115 ~~available. Agencies should decide whether they will offer assurances of protection from~~
116 ~~disclosure for confidential commercial information. Factors that weigh in favor of~~
117 ~~offering assurances of protection from disclosure include:~~
- 118 ~~a. The agency has the resources to identify and withhold confidential~~
119 ~~commercial information;~~
 - 120 ~~b. The agency receives a high volume of requests for protected treatment of~~
121 ~~confidential commercial information;~~
 - 122 ~~c. The agency's rulemaking efforts can benefit from the agency's review of~~
123 ~~confidential commercial information; and~~
 - 124 ~~d. The agency can identify no substitute for confidential commercial information~~
125 ~~that would inform its rulemaking in a comparable manner.~~
- 126 5. Agencies that choose to offer assurances of protection from disclosure ~~for~~of confidential
127 commercial information should decide how they will offer them. Agencies can choose to
128 inform submitters, directly upon submission, that they will accord confidential
129 commercial information protected treatment; post a general notice informing submitters
130 that confidential commercial information will be accorded protected treatment; or both.
- 131 6. Agencies that choose to offer assurances of protection from disclosure ~~for~~of confidential
132 commercial information should adopt policies to help them identify such information.
133 Agencies should consider ~~including~~doing the following, either in tandem or as
134 alternatives, as part of their policies:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 135 a. Instructing submitters to ~~write the word “Private,” “Protected,” or similar~~
136 ~~language within the header of their submissions that contain~~ clearly identify
137 ~~that the document contains~~ confidential commercial information;
138 b. Instructing submitters to flag the particular text within the ~~comment~~ document
139 that constitutes confidential commercial information; and
140 c. Instructing submitters to submit both redacted and unredacted versions of a
141 comment that contains confidential commercial information.
- 142 7. Agencies that choose to ~~accord protected treatment for~~ offer assurances of protection from
143 ~~disclosure of~~ confidential commercial information should withhold such material, using
144 the techniques described in Paragraph ~~11~~ 10 below as appropriate.

Allowing Submitters to Notify the Agency of Material They Inadvertently Submitted

- 145 ~~8. Agencies should give~~ notified by submitters ~~an opportunity to alert relevant agency~~
146 ~~officials to any personal information that~~ they inadvertently included ~~personal or~~
147 ~~confidential commercial information~~ in their comments.
- 148 ~~9.8. Agencies should ensure that the personal, agencies should act as promptly as possible to~~
149 ~~determine whether such information submitters have identified as inadvertently submitted~~
150 ~~is not publicly disclosed warrants protection and if so, protect it from publication, or, if~~
151 ~~already disclosed, is removed as promptly as possible. remove it.~~

Allowing People/Third Parties to Notify the Agency, After the Agency Publishes the Comment, of Personal and Confidential Commercial Information/Material They Want Removed

- 152 ~~10.9.~~ Agencies should allow ~~people~~ third parties to request that personal or confidential
153 commercial information pertaining to themselves or a dependent within ~~the~~ published
154 comment be removed from public exposure. Agencies should review such requests and,
155 upon determining that the information subject to the request is, in fact, personal or



156 confidential commercial information, they should take all steps necessary to so remove it:
157 as promptly as possible.

Screening Comments for ~~Protected Material~~Personal Information and Protecting Such Material from Disclosure

158 ~~11-10.~~ Agencies ~~should~~that screen comments for ~~protected material~~. If, when screening,
159 ~~an personal information prior to publication in the public rulemaking docket, either as~~
160 ~~required by law or as a matter of~~ agency determines that a comment contains discretion,
161 should:

- 162 a. ~~Isolated instances of protected material, the agency should~~ redact that material~~the~~
163 ~~personal information~~ and publish the rest of the comment, ~~if such information~~
164 ~~appears infrequently~~. Redaction should be thorough enough to prevent a person
165 from discerning the redacted information, but not so broad as to prevent the public
166 from viewing non-~~protected~~personal material; and
167 b. ~~Protected material pertaining to a large number of people, the agency should~~
168 delink the data from the individuals to whom the data belong and present the data
169 in a summarized form, such as an average (hereinafter “aggregation”~~”~~), ~~if such~~
170 ~~information pertains to large numbers of people~~. Agencies should work with data
171 science experts and others in relevant disciplines to ensure that aggregation is
172 thorough enough to prevent someone from disaggregating the data (i.e., linking
173 the aggregated data with any person).

174 ~~12-11.~~ If redaction and aggregation would still permit a member of the public to identify
175 the redacted material, or disaggregate the aggregated material, the agency should
176 withhold the comment in its entirety~~”,~~ ~~describing the material it has withheld pursuant to~~
177 ~~Paragraph 13 below~~.

178 ~~13-12.~~ Agencies should explore using a variety of computer-based tools to aid in their
179 identification of ~~protected material~~personal information. This exploration should include
180 speaking with private sector experts and technology-focused agencies such as the General
181 Services Administration’s Technology Transformation Service and the Office of

Commented [TR5]: During the second Committee meeting, Andrew Simons (EPA) noted that it could be a lengthy and complicated process for an agency to identify confidential commercial information and questioned whether it is realistic for agencies to do so. The Committee bracketed this for further discussion at the third Committee meeting.

Commented [TR6]: Recommendations 8–9 were modified based on Senior Fellow Neil R. Eisner’s comments at the second Committee meeting.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

182 Management and Budget’s United States Digital Service to determine which tools are
183 most appropriate and how they can be best deployed given the agencies’ resources.

Describing Material an Agency Has Withheld

184 ~~14.13.~~ When agencies withhold from public disclosure personal or confidential
185 commercial information they have received from the public in connection with a
186 rulemaking and on which they have relied in formulating rules, they should describe the
187 withheld material in as much detail as possible without compromising its confidentiality.
188 In doing so, agencies should consider preparing explanatory staff or technical reports and
189 should publish these reports on the parts of their websites that describe their rulemaking
190 processes and within the preambles to final rules.

Commented [TR7]: Senior Fellow Richard J. Pierce, Jr. suggests, in his published comment (8/18/2020), changing “information . . . on which they have relied” to “information . . . they may have considered.”