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Protected Materials in Public Rulemaking Dockets

Committee on Rulemaking

Proposed Recommendation for Committee | ~~August 31~~ November 18, 2020

Commented [TR1]: Note for the Committee: Other than the edits identified in the comments below, all other changes ACUS staff made to this document are purely stylistic.

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. Their purpose is
5 to provide the public with the information that informed the agency’s rulemaking.¹

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

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~~ means the public all comments and materials submitted to the agency during comment periods and any other materials the agency considered during the course of the 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,



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9 agencies should handle rulemaking materials they determine should be withheld to protect
10 personal and confidential commercial information (hereinafter “protected material”);
11 notwithstanding any countervailing benefits of disclosure.

12 The scope of the Recommendation is explicitly limited to protecting personal information
13 and confidential commercial information— that an agency has decided to withhold from its public
14 rulemaking docket, which this Recommendation calls “protected material.” The
15 Recommendation specifies how agencies should handle protected material, notwithstanding any
16 countervailing benefits of disclosure. For purposes of this Recommendation, personal
17 information is information that can be used to distinguish or trace an individual’s identity, either
18 alone or when combined with other information.³ Confidential commercial information is
19 commercial information that is customarily kept private, or at least closely held, by the person or
20 business providing it.⁴ Other types of protected information, such as national security
21 information and copyrighted materials, are beyond the Recommendation’s scope. The
22 Recommendation is also limited to addressing procedures for protecting materials that agencies

Commented [TR2]: Note for the Committee: The Committee may wish to consider deleting this phrase or replacing the word “notwithstanding” with a different word.

Commented [TR3]: Note for the Committee: ACUS staff added these definitions to provide greater clarity.

76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011). Recommendation 2013-4, *the Administrative Record in Informal Rulemaking* *supra* note 1, ¶ 11, 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).

³ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-130, *MANAGING INFORMATION AS A STRATEGIC RESOURCE* § 10 (37) (2016).

⁴ See *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).



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23 decide warrant protection. ~~The Recommendation~~It is not intended to ~~offer suggestions on what is~~
24 ~~or is not a~~define the universe of protected ~~material.~~ materials.

25 Though not intended as an exhaustive list, the following types of information typically
26 qualify as “protected materials” in most agencies. One category of protected materials covers
27 unique identification numbers, either of submitters themselves or of third parties, that create a
28 high risk of identity theft if disclosed. This category includes social security numbers, bank
29 account numbers, and passport numbers. Another category consists of two kinds of personal
30 information: information about the submitter submitted to the agency accidentally, and
31 information pertaining to someone other than the submitter. Information within this category
32 includes names, email addresses, physical addresses, medical information, and so on. A third
33 category consists of confidential commercial information provided to the agency under an
34 assurance of protection from disclosure. Currently, agencies Agencies accept public comments
35 for their public rulemaking dockets primarily through Regulations.gov ~~and~~, their own websites,
36 and email. Regulations.gov and many agency websites that accept comments expressly notify the
37 public that the agencyagencies may publish the information it receivesubmitted in public
38 comments.⁵ When a person submits a comment to an agency, however, the agency typically does
39 not immediately publish the comment. Instead, ~~the agency takes~~the agency generally takes time
40 to reviewscreen comments before publishing them. Most agencies perform at least some kind of
41 screening during this period.

⁵ 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>.



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[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;
- H. 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]

For all agencies, whether to withhold or disclose protected material is governed by various laws: some mandate disclosure, some mandate withholding, and some leave agencies with substantial discretion in deciding whether to disclose. Although a full description of those laws is beyond the scope of this Recommendation, a brief overview of at least some of this body of law helps to identify the issues agencies face.

The Administrative Procedure Act requires agencies to “give interested persons an opportunity to participate in rulemaking through submission of written data, views, or arguments.”⁶ The United States Court of Appeals for the D.C. Circuit has interpreted this provision to ordinarily require that agencies make publicly available the critical information—including studies, data, and methodologies—underlying proposed rules.⁷

⁶ 5 U.S.C. § 553(c).

⁷ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). In addition to these public transparency requirements, there are a number of federal record-retention requirements of which agencies should be aware. See, e.g., 44 U.S.C. § 3301.



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59 The Privacy Act and the Trade Secrets Act place limits on the disclosure norm discussed
60 above. Generally, the Privacy Act prevents agencies from disclosing any information about a
61 person, such as medical records, educational background, and employment history, contained in
62 an agency's system of records without that person's written consent.⁸ The Trade Secrets Act
63 generally prevents agencies from disclosing trade secrets and other kinds of confidential
64 commercial information, such as corporate losses and profits.⁹

65 Both the Privacy Act and the Trade Secrets Act have exceptions. For the Privacy Act, the
66 only exception relevant to this Recommendation is for information required to be released under
67 the Freedom of Information Act (FOIA).¹⁰ The Trade Secrets Act only has one exception, which
68 covers any materials authorized to be disclosed by statute (including FOIA) or regulation.¹¹
69 Whether a particular piece of personal or confidential commercial information meets one of the
70 exceptions often involves a complex determination that depends upon the exact type of
71 information at issue and its contemplated use, and agencies must determine the applicability of
72 the exceptions on a case-by-case basis. For example, whether FOIA authorizes disclosure of
73 confidential commercial information may turn in part on whether the agency in receipt of the
74 information assured the submitter that the information would be withheld from the public.¹² If an
75 agency offers assurances that it will not disclose confidential commercial information, the

⁸ 5 U.S.C. § 552a(b).

⁹ 18 U.S.C. § 1905.

¹⁰ 5 U.S.C. § 552a(b)(2).

¹¹ See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1137-43 (D.C. Cir. 1987).

¹² See *Food Mktg. Inst.*, 139 S. Ct. at 2361.



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76 agency and the submitter may rely on those assurances as a defense against compelled disclosure
77 under FOIA. In many cases, agencies assure companies that they will not disclose such
78 information in order to encourage companies to submit it.

79 Either by law or as a matter of discretion, agencies often consider certain types of
80 personal information and confidential commercial information to be protected material (e.g.,
81 trade secrets, social security numbers, bank account numbers, passport numbers, addresses, email
82 addresses, medical information, and information concerning a person’s finances), though
83 particular cases are governed by specific requirements of law, not broad categorical labels.

84 There are many ways such protected material may arrive at the agency in a rulemaking. A
85 person might submit his or her own information, intentionally or unintentionally, and then ask
86 the agency not to disclose it. A third party might submit another person’s information, with or
87 without that person’s knowledge. A company might submit a document containing its own
88 confidential commercial information, intentionally or unintentionally, with or without the
89 agency’s prior assurance of protection. Or a company might submit another company’s or
90 person’s information. Depending on the information in question, and the manner in which it was
91 submitted, there may be issues of waiver of statutory protection. Such questions, like all
92 questions regarding the substance of the laws governing protected material, are beyond this
93 Recommendation’s scope, but they illustrate the various considerations that agencies and the
94 public often face in the submission and handling of such material.

95 This Recommendation ~~prescribes~~proposes steps agencies can take to ~~excludewithhold~~
96 ~~protected materials~~ from their public rulemaking dockets ~~protected material~~ while still providing

Commented [TR4]: Note for the Committee: These paragraphs, which describe relevant law, replace a previous description of the law that the Committee asked us to extensively revise.

Commented [TR5]: Note for the Committee: Scott Albright (EPA) suggests revising this phrase and switching the order of the sentence so that what currently reads “[e]ither by law or as a matter of discretion” comes after “agencies often consider . . .”

Commented [TR6]: Note for the Committee: These paragraphs, which describe examples of protected material, replace a previous description of examples that the Committee instructed us to extensively revise (see lines 25–34).



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97 the public with the information upon which agencies relied in formulating ~~the~~ proposed rule.¹³

98 ~~These steps include, among others, aggregating the data, which means delinking the data from~~

99 ~~the individuals to whom the data belong and then presenting the data in a summarized form, such~~

100 ~~as a median. The Recommendation also identifies resources that can help agencies implement the~~

101 ~~principle of excluding from their public rulemaking dockets protected material while still~~

102 ~~providing the public with the information upon which the agency relied in formulating the~~

103 ~~proposed rule.~~

RECOMMENDATION

Recommendations for All Agencies

1. ~~Agencies should decide whether to withhold protected personal information or confidential commercial information (hereinafter “protected material”) from public rulemaking dockets, notwithstanding any countervailing public benefits of disclosure. To reduce the risk that agencies will inadvertently disclose personal or confidential commercial information they determine should be withheld from the public rulemaking docket (hereinafter “protected material”), agencies should develop written policies that describe what kinds of personal and confidential commercial information qualify as “protected material” and should clearly notify the public about their treatment of protected material.~~

Commented [TR7]: Note for the Committee: ACUS staff revised this because the original wording implies that agencies have a choice as to whether to withhold protected material whereas in many instances, the outcome may be prescribed by law. Additionally, the revised version introduces the notion of agencies’ establishing written policies, which was an implicit assumption underlying subsequent numbered paragraphs and is now explicit.

¹³ ~~Although~~Permitting the submission of anonymous and pseudonymous comments ~~may serve~~ one way that some agencies attempt to protect ~~reduce the privacy risks that commenters face when submitting protected information,~~ issues material. Issues regarding the submission of anonymous and pseudonymous comments are being considered in an ongoing ACUS project of the Administrative Conference titled “Mass, Computer-Generated, and Fraudulent Comments” and are beyond the scope of this Recommendation.



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114 2.1. An agency's notifications should:

- 115 a. Inform members of the public that comments are generally subject to public
- 116 disclosure, except when disclosure is limited by law;
- 117 b. Inform members of the public whether the agency offers assurances of
- 118 protection from disclosure for their confidential commercial information and
- 119 if so, how to identify such information for the agency;
- 120 c. ~~Instruct members of the public never to submit unique identification numbers~~
- 121 ~~such as social security numbers and other kinds of personal or confidential~~
- 122 ~~commercial information-protected material~~ that pertain to third parties, such as
- 123 medical information and trade secrets;
- 124 d. Advise members of the public to review their comments for the material
- 125 identified above in (c); and, if they find such material, to remove it;
- 126 e. Inform members of the public that they may request, during the period
- 127 between when a comment is received and when it is made public, that
- 128 ~~personal information-protected material~~ they inadvertently submitted be
- 129 withheld;
- 130 f. Inform members of the public that they may request, after the agency has
- 131 published any comment, that ~~personal or confidential commercial~~
- 132 ~~information-protected~~ ~~pertaining material pertaining~~ to themselves or to their
- 133 dependents within the comment be removed ~~from public exposure from the~~
- 134 ~~public rulemaking docket~~; and
- 135 g. Inform members of the public that the agency reserves the right to redact or
- 136 aggregate any part of a comment if the agency determines that it constitutes
- 137 protected material, or may withhold a comment in its entirety if it determines

Commented [TR8]: Note for the Committee: No substantive changes were made to (c) and (d), but the Acting Committee Chair thinks they are worth revisiting. They are in tension with the statements in the preamble that "[t]he Recommendation is . . . limited to addressing procedures for protecting materials that agencies decide warrant protection. It is not intended to define the universe of protected materials."

Commented [TR9]: Note for the Committee: The Acting Committee Chair believes that this paragraph should not be limited to "personal information." Framing this recommendation broadly to cover all protected material will avoid the appearance of implying that this is not also an issue for confidential commercial information.



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that redaction or aggregation would insufficiently prevent the disclosure of ~~this information~~this material.

~~3.2.~~3.2. An agency should include the written policies and notifications described in Paragraph 12, or a link to those written policies and notifications, in at least the following places:

- a. Within the rulemaking document upon which the agency requests comments, such as a notice of proposed rulemaking or an advanced notice of proposed rulemaking;
- b. On the agency’s own comment submission form, if the agency has one;
- c. Within any automatic emails that an agency sends acknowledging receipt of a comment;
- d. On any part of the agency’s website that describes its rulemaking process; and
- e. Within any notices of public meetings pertaining to the rule.

~~4.3.~~4.3. The General Services Administration’s eRulemaking Program Management Office should work with agencies that participate in Regulations.gov to include or refer to the notifications described in Paragraph 12 within any automated emails Regulations.gov sends acknowledging receipt of a comment.

~~5.4.~~5.4. If ~~notified by submitters~~ a submitter notifies an agency that ~~they~~ submitter inadvertently included ~~personal or confidential commercial information-protected material~~ in their~~the~~ submitter’s comments, ~~the~~ agency~~ies~~ should act as promptly as possible to determine whether such ~~information~~material warrants ~~protection~~withholding from the public rulemaking docket and if so, ~~protect it from publication~~withhold it from the public rulemaking docket, or, if already disclosed, remove it ~~from the public rulemaking docket~~.

5. Agencies should allow third parties to request that ~~personal or confidential commercial information-protected material~~ pertaining to themselves or a dependent ~~within a~~

Commented [TR10]: Note for the Committee: This originally read “notifications” rather than “written ACUS staff added “written policies” to conform with the changes made to Paragraph 1. This rationale also applies to the use of “written policies and notifications” in Paragraph 3.



published comment be removed from the public exposure rulemaking docket. Agencies should review such requests and, upon determining that the information material subject to the request is, in fact, personal or confidential commercial information request qualifies as protected material, they should take all steps necessary to so remove it from the public rulemaking docket as promptly as possible.

Recommendations for Agencies That Screen Comments for Protected Material Before Publication in the Public Rulemaking Docket

6. Agencies that screen comments for personal information protected material prior to before publication in the public rulemaking docket, either as required by law or as a matter of agency discretion, should redact the personal information protected material, if and appropriate, and publish the rest of the comment, if such information material appears infrequently. Redaction should be thorough enough to prevent a person from discerning the redacted information material, but not so broad as to prevent the public from viewing non-personal protected material.

7. If redaction is not feasible due to the high volume of protected material within a comment, agencies should delink the data from the individuals to whom the data belong and consider presenting the data in a summarized form, such as an average (hereinafter "aggregation"); if such information pertains to large numbers of people. Agencies should work with data science experts and others in relevant disciplines to ensure that aggregation is thorough enough to prevent someone from disaggregating the data (i.e., relinking the aggregated data with any person the people to whom such data belong).

8. If redaction and aggregation would still permit a member of the public to identify the redacted protected material, or disaggregate the aggregated material, the agencies should withhold the comment in its entirety. When agencies withhold from public disclosure

Commented [TR11]: Note for the Committee: This, and all other uses of the term "protected material" within this section, initially read "personal information." Christopher Yoo's research revealed that some agencies do screen comments for confidential commercial information (even though, as his report notes, screening for such information may be unnecessary) and the Acting Committee Chair believes that paragraphs 6-9 apply with equal force to such agencies. Framing this recommendation broadly to cover all protected material will avoid the appearance of implying that this is not also an issue for confidential commercial information.

Commented [TR12]: Note for the Committee: Public Member Emily S. Bremer writes: "there are now two caveats, one of which (if appropriate) seems broad enough to capture the other (re: volume of material needing to be redacted). My initial thought . . . was that it seems odd to include two caveats if one will do, and it seems like "if appropriate" should cover the water. From the following recommendations, however, I came to wonder whether the only issue we are concerned about is the proportion of protected material within a comment, in which case the "if appropriate" seems mysterious.

Commented [TR13]: Note for the Committee: No substantive changes were made to these lines, but the Committee may wish to consider making them. Public Member Emily S. Bremer writes: "The problem and the solution don't seem to match. That is, the problem seems to be protected information within a single comment, which may or may not be such a large percentage of the whole comment as to warrant redaction instead of withholding the whole comment. But the solution is aggregation of information across many comments. I just found this confusing. Maybe I am missing something.



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186 ~~personal or confidential commercial information they have received from the public in~~
 187 ~~connection with a rulemaking and may have considered in formulating the rule, doing so,~~
 188 they should describe the withheld material for the public in as much detail as possible
 189 without compromising its confidentiality. ~~In doing so, agencies should consider preparing~~
 190 ~~explanatory staff or technical reports and should publish these reports on the parts of their~~
 191 ~~websites that describe their rulemaking processes and Agencies should include such~~
 192 ~~descriptions within the preambles to final rules. Agencies should also include, on the~~
 193 ~~parts of their websites that describe their rulemaking processes, their general policy, if~~
 194 ~~any, with respect to preparing such descriptions and their policies with respect to~~
 195 ~~redacting, aggregating, and withholding protected material.~~

Commented [TR14]: Andy Simons (EPA) suggests adding: "or response to comments to final rules" after this phrase.

196 9. When deciding whether and how to redact, aggregate, or withhold protected material,
 197 ~~a~~Agencies should explore using ~~a variety of computer~~artificial intelligence-based tools to
 198 aid ~~in their identification of personal information~~in identifying protected material. ~~This~~
 199 ~~exploration should include~~Agencies ~~should speaking~~ with private sector experts
 200 and technology-focused agencies such as the General Services Administration's
 201 Technology Transformation Service and the Office of Management and Budget's United
 202 States Digital Service to determine which tools are most appropriate and how they can be
 203 best deployed given the agencies' resources.

Commented [TR15]: Note for the Committee: The ACUS staff changed this because the terms "explanatory staff or technical reports" are not clear and the revised language captures what seems to have been the Committee's intent here.



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204 Recommendations for Agencies That Offer Assurances of Protection from Disclosure of
205 Confidential Commercial Information

206 ~~9.10.~~ Agencies that ~~choose to~~ offer assurances of protection from disclosure of
207 confidential commercial information should decide how they will offer ~~them~~such
208 assurances. Agencies can choose to inform submitters, directly upon submission, that
209 they will ~~accord~~withhold confidential commercial information ~~protected treatment from~~
210 the public rulemaking docket; post a general notice informing submitters that confidential
211 commercial information will be ~~accorded protected treatment~~withheld from the public
212 rulemaking docket; or both.

213 ~~10.11.~~ Agencies that choose to offer assurances of protection from disclosure of
214 ~~confidential commercial information~~Such agencies should adopt policies to help them
215 identify such information. Agencies ~~should consider doing the~~include the following,
216 either in tandem or as alternatives, as part of their policies:

- 217 a. Instructing submitters to clearly identify that the document ~~contains~~
218 confidentialcontains confidential commercial information;
- 219 b. Instructing submitters to flag the particular text within the document that
220 constitutes confidential commercial information; and
- 221 c. Instructing submitters to submit both redacted and unredacted versions of a
222 comment that contains confidential commercial information.

Commented [TR16]: Andy Simons (EPA) suggests changing this to "should consider including."