



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Memorandum

To: Committee on Judicial Review

From: Stephanie Tatham, Staff Counsel

Date: March 15, 2013

Re: 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*. This draft recommendation is intended to facilitate the Committee’s discussion at its March 19, 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

The administrative record is an essential part of judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which directs courts to “review the whole record or those parts of it cited by a party” to determine whether agency action is lawful.¹ This statutory language was originally understood as referring to formal proceedings. However, the Supreme Court has long interpreted the APA as also encompassing the “administrative record” in informal agency proceedings whether reviewable by statute or as final agency actions under 5 U.S.C. § 704.² This application to informal proceedings has given

¹ 5 U.S.C. § 706.

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



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rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept. The Administrative Conference has therefore commissioned a study of federal agencies' current practices in the development of public rulemaking dockets, administrative records, and certified administrative records for purposes of judicial review.³ This recommendation and the supporting Report address the administrative record concept in the limited context of informal agency rulemaking for legislative rules adopted pursuant to procedures prescribed in 5 U.S.C. § 553. They do not address the record for agency decisions made in other contexts, such as in guidance documents, adjudications, or formal rulemakings.

This recommendation builds upon important earlier Administrative Conference works in the areas of rulemaking, recordkeeping, and technological developments in managing records. Administrative Conference Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, first identified the administrative materials that should be before a court in evaluating, on preenforcement review, the factual basis for agency rules of general applicability.⁴ The recommendation was directed, in part, at the judicial development of a lexicon of administrative law terms, including "record", on review of informal agency rulemakings.⁵ In Recommendation 93-4, *Improving the Environment for Agency Rulemaking*, the Administrative Conference advised agencies to establish⁶ and manage rulemaking files "so maximum disclosure to the public is achieved during the comment period and so that a usable

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).

⁴ 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).

⁵ See Paul Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974) (based on consultant report prepared for the Administrative Conference).

⁶ 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).



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and reliable file is available for purposes of judicial review.”⁷ A number of Administrative Conference recommendations have examined the use of technology in acquiring, releasing, and managing agency records.⁸ Most recently, the Conference examined legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.⁹

This recommendation and the accompanying Report examine the following issues in considering the administrative record in the context of informal rulemaking:

Contents of the Administrative Record. In keeping with past recommendations and bearing in mind agency disclosure obligations and exemptions under the Freedom of Information Act, as well as the need to protect sensitive information, the Conference has examined the distinctions between agency public dockets and records, agency administrative records, and certified administrative records provided to federal courts on review of agency action. Although agencies and courts have taken varied approaches to defining the contents of the administrative record and the record on review, the Conference recommends that the administrative record include all materials considered by the agency during the informal rulemaking and that agencies manage their administrative records to achieve maximum disclosure to the public. The question of what has been considered has been addressed in prior recommendations and remains a matter of some discussion.

An agency’s administrative record in informal rulemaking should contain: i) all notices pertaining to the rulemaking and any documents referred to therein; ii) comments and other

⁷ *Id.*

⁸ 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 (Feb. 2, 1989).

⁹ Recommendation 2011-1, *supra*.



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documents submitted to the agency; iii) any transcripts of oral presentations made in the course of a rulemaking; iv) reports of any advisory committees; v) copies or an index of all factual material, studies, and reports not included in the forgoing and considered by agency personnel in formulating the proposed or final rule; vi) any other material required by statute, executive order, or agency rule to be made public or considered in connection with the rulemaking; and vii) any other materials proffered by the agency as pertinent to the rule.

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

Preservation of administrative records. Expanding upon its earlier examination of agency e-rulemaking records,¹⁰ the Conference has explored agency preservation of administrative records, including the use of the Federal Document Management System, for maintenance of agency files as permanent or temporary records.

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

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

¹⁰ Bridget C.E. Dooling, *Legal Issues in e-Rulemaking* 31-32 (2011) (report to the Administrative Conference of the United States).



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varying agency practices.¹¹ The Conference recommends that agencies issue guidance to aid personnel in compiling administrative records in accordance with these recommendations.

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

[DRAFT] RECOMMENDATION

The Administrative Record

1. *Agency Administrative Records.*
 - (a) In the absence of a specific statutory requirement to the contrary, the agency administrative record in informal rulemaking should contain:
 - i. all notices pertaining to the rulemaking and any documents referred to therein;
 - ii. comments and other documents submitted to the agency related to the rulemaking;
 - iii. any transcripts of oral presentations made in the course of a rulemaking;
 - iv. reports of any advisory committees;

¹¹ 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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- v. copies or an index of all factual material, studies, and reports not included in the forgoing and considered by agency personnel in formulating the proposed or final rule;
- vi. any other material required by statute, executive order, or agency rule to be made public or considered in connection with the rulemaking; and
- vii. any other materials proffered by the agency as pertinent to the rule.

(b) Agencies should manage their administrative records to achieve maximum disclosure to the public.

2. The Administrative Record certified to the court on judicial review of informal rulemaking should contain all of the materials in the administrative record as set forth in Recommendation One, subpart a, except: materials for which disclosure is prohibited or that are otherwise protected from disclosure by law; and materials that the agency has determined are subject to withholding on the basis of legal privilege in the forum for review, and that it sees fit to withhold. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

Compiling and Indexing the Administrative Record

3. Agencies should customarily compile administrative records contemporaneously with an informal rulemaking proceeding rather than after signature by the designated agency official or the rule is challenged in federal court, unless limited resources or risk evaluation weigh against the practice. Agencies should begin compiling administrative records not later than the date on which an agency publishes an advance notice of proposed rulemaking or notice of proposed rulemaking, whichever is earlier.

4. Agencies should maximize opportunities to index administrative records for informal rulemaking on an ongoing basis, at an appropriate level of detail, and consistent with privilege and Freedom of Information Act indexing practices.



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5. Agencies should designate a custodian for administrative recordkeeping, on a rulemaking by rulemaking basis, when administrative records in an informal rulemaking are compiled contemporaneously, as well as for preparation of a certified administrative record in the event of judicial review of an agency rule. Agencies should inform agency personnel of the custodian(s) and direct them to deposit materials considered during the rulemaking with the custodian(s). The custodian should document the record compilation process.

Preserving Administrative Records

6. The National Archives and Records Administration (NARA) should consider amending its agency guidance to specifically indicate the legal value of records relating to the promulgation of legislative rules, particularly certified administrative records.

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

Certified Administrative Records and Judicial Review

8. Agencies should develop procedures for designating appropriate individuals, who may or may not be record custodians, to certify rulemaking records to the court in case of judicial review of agency action. The agency should briefly and generally describe exclusions from the administrative record in its certification to the court.

Agency Guidance on Informal Rulemaking Administrative Records

9. Subject to resources, agencies should prepare guidance to aid personnel in implementing the best practices above. Agencies should make their guidance on informal rulemaking administrative records available to the public and to the Department of Justice, if



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the Department represents them in litigation. The level of detail and contents of such guidance will naturally vary based on factors such as: the size of typical agency rulemaking records; institutional experience, or the lack thereof, with record compilation and on-the-record litigation; the need for consistency across agency components in the development and maintenance of rulemaking records; and agency resources. However, agencies should ensure that guidance addresses at least the following:

- (a) essential components of the administrative record and the certified administrative record;
- (b) timing of administrative record compilation and indexing practices;
- (c) identification of types of documents that might be excluded from the public docket or certified administrative record (*e.g.*, privileged materials, confidential information protected from disclosure by statute or regulation, information not relied upon, etc.);
- (d) preservation of administrative records; and
- (e) certification of the record on review, including the process for identifying the appropriate certifying official.

If relevant, agency guidance should also discuss:

- (f) capabilities and limitations of recordkeeping tools and technologies; and
- (g) available policies and procedures for the protection of sensitive information submitted by the public during the process of rulemaking or otherwise contained in the administrative record.