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Privacy vs. Transparency: Handling Protected Materials in Agency Rulemaking

CHRISTOPHER S. YOO* AND KELLEN MCCOY**

Agencies conducting informal rulemaking proceedings increasingly confront conflicting duties with respect to protected materials included in information submitted in public rulemaking dockets. They must reconcile the broad commitment to openness and transparency reflected in federal law with the duty to protect confidential business information (CBI) and personally identifiable information (PII) against improper disclosure.

This Article presents an analysis of how agencies can best balance these often-countervailing considerations. Part I explores the statutory duties to disclose and withhold information submitted in public rulemaking dockets placed on agencies. It also examines judicial decisions and other legal interpretations regarding the proper way to tradeoff these opposing concerns. Part II explores current agency practices with respect to protected materials, based on both a survey of notices of proposed rulemaking (NPRMs), system of records notices (SORNs), and other notices issued by agencies along with interviews, a roundtable with agency officials, and a confidential survey sent to selected federal agencies. Part III recommends possible changes to agency practices and procedures.

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INTRODUCTION

One of the most remarkable developments in public involvement in government processes has been the integration of online services into administrative processes. Driven by legal measures such as the E-Government Act of 2002¹ and Executive Order No. 13,563,² federal agencies have revised their rulemaking processes to expand the public's ability to submit comments and access dockets electronically from anywhere in the world. The expanded use of computers and digital technologies has enhanced the opportunities for citizens to participate more fully in the administrative state and to hold the government more accountable.

At the same time, the transition toward mass online participation has also increased the risks for the online disclosure of confidential business information (CBI) or personally identifiable information (PII). For example, the Privacy Act of 1974 responded to the increasing use of computers by creating statutory restrictions

1. E-Government Act of 2002, Pub. L. No. 107-347, § 206(c), (d)(1)–(2), 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).

2. Exec. Order No. 13,563, § 2(a)–(b), 3 C.F.R. § 215 (2012), *reprinted in* 76 Fed. Reg. 3821 (Jan. 18, 2011) *and* 5 U.S.C. § 601 app. at 836–37 (2018).

on the disclosure of information about individuals.³ The E-Government Act similarly specifies that online access to government information must be “provide[d] . . . in a manner consistent with laws regarding protection of personal privacy” and by requiring agencies collecting new information to conduct privacy impact assessments.⁴ Other statutes, such as the Administrative Procedure Act (APA),⁵ the Government in the Sunshine Act,⁶ the Trade Secrets Act,⁷ and most importantly the Freedom of Information Act,⁸ require agencies to balance the commitment to transparency in government decision-making against the obligation to protect personal information. Administrative Conference Recommendation 2013-4 echoes these concerns when it advises agencies to “develop a general policy regarding treatment of protected or privileged materials” and disclose those policies to the public.⁹

This Article examines the relevant legal obligations and current agency practices on how to balance the demands of open government against the obligation to protect privacy and confidential business information. Part I details the competing statutory obligations to disclose and withhold information submitted during informal rulemaking proceedings and examines the judicial precedent considering how to strike the proper balance between these two often-countervailing considerations. Part II analyzes current agency practices with respect to disclosure and withholding as reflected in current notices of proposed rulemaking (NPRMs), system of record notices (SORNs), disclosures contained in online portals for submitting comments in rulemaking proceedings, and a survey circulated to Administrative Conference member agencies. Part III offers a series of recommendations based on the preceding legal and empirical analysis. Part IV concludes.

I. LEGAL DUTIES TO DISCLOSE AND WITHHOLD PROTECTED MATERIALS SUBMITTED IN PUBLIC RULEMAKING DOCKETS

The administrative agencies of the United States are obligated to comply with numerous and occasionally conflicting legal obligations with respect to disclosure of information submitted during the rulemaking process. On the one hand, acts such as the E-Government Act of 2002, the Freedom of Information Act (FOIA), the APA, and the Government in the Sunshine Act mandate openness and disclosure from federal agencies. On the other hand, the Privacy Act, the Trade Secrets Act, the privacy provisions of the E-Government Act, and the enumerated exemptions contained in FOIA and the Sunshine Act charge agencies with a duty to keep certain

3. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(2), (a)(5), 88 Stat. 1896, 1896, (codified at 5 U.S.C. § 552a note).

4. § 2(b)(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

5. 5 U.S.C. § 553.

6. *Id.* § 552b.

7. 18 U.S.C. § 1905.

8. 5 U.S.C. § 552.

9. *Administrative Conference Recommendation 2013-4: The Administrative Record in Informal Rulemaking*, ADMIN. CONF. U.S. 10 (June 14, 2013), https://www.acus.gov/sites/default/files/documents/Administrative%20Record%20_%20Final%20Recommendation%20_%20Approved_0.pdf [<https://perma.cc/AJ5G-DVQ5>].

PII and CBI away from public view. When administrative agencies make decisions regarding what should and should not be disclosed, they must balance these competing mandates.

A. The E-Government Act of 2002

Congress enacted the E-Government Act of 2002 “[t]o enhance the management and promotion of electronic Government services and processes” and “to enhance citizen access to Government information and services.”¹⁰ The statute specified eleven purposes, nine devoted to “improving government efficiency, organization, and decision-making”¹¹ and two devoted “[t]o provid[ing] increased opportunities for citizen participation in Government” and “[t]o mak[ing] the Federal Government more transparent and accountable.”¹²

To effectuate these goals, Section 206 of the E-Government Act, entitled “Regulatory Agencies,” provides that “[t]o the extent practicable, agencies shall accept submissions” in response to an NPRM “by electronic means.”¹³ In addition, “[t]o the extent practicable, as determined by the agency in consultation with the Director [of the Office of Management and Budget (OMB)], agencies shall ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings” under the APA.¹⁴ These “[a]gency electronic dockets shall make publicly available online . . . all submissions” in response to an NPRM and “other materials that by agency rule or practice are included in the rulemaking docket,” again “[t]o the extent practicable as determined by the agency and the Director.”¹⁵

In addition to the provisions requiring agencies to “modernize and regulate the government’s use of information technology,” the statute contains other provisions balancing that interest against the need to protect the privacy interests of individuals.¹⁶ Among the E-Government Act’s statutory purposes is “[t]o provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.”¹⁷

To strike the appropriate balance, Section 208 of the E-Government Act, entitled “Privacy Provisions,” has the stated purpose of “ensur[ing] sufficient protections for the privacy of personal information as agencies implement citizen-centered electronic Government.”¹⁸ It requires agencies that are “developing or procuring information technology” or “initiating a new collection of information” to conduct “privacy impact assessment[s]” that are reviewed by the agency’s Chief Information

10. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2899.

11. Elec. Priv. Info. Ctr. v. U.S. Dep’t of Com., 928 F.3d 95, 98 (D.C. Cir. 2019). For these purposes, see § 2(b)(1), (b)(3)–(8), (b)(10)–(11), 116 Stat. at 2900–01 (codified at 44 U.S.C. § 3601 note).

12. § 2(b)(2), (b)(9), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

13. § 206(c), 116 Stat. at 2916 (codified at 44 U.S.C. § 3501 note).

14. § 206(d)(1), 116 Stat. at 2916 (codified at 44 U.S.C. § 3501 note).

15. § 206(d)(2), (d)(2)(B), 116 Stat. at 2916 (codified at 44 U.S.C. § 3501 note).

16. Elec. Priv. Info. Ctr. v. U.S. Dep’t of Com., 928 F.3d 95, 98 (D.C. Cir. 2019).

17. § 2(b)(11), 116 Stat. at 2901 (codified at 44 U.S.C. § 3601 note).

18. § 208(a), 116 Stat. at 2921 (codified at 44 U.S.C. § 3501 note).

Officer and made publicly available.¹⁹ Agencies typically completed these privacy impact assessments when they switched to using Regulations.gov to collect comments.²⁰ The statute further requires the OMB Director to develop guidelines for privacy notices on agency websites.²¹ Courts have observed that, unlike FOIA, “Section 208 was not designed to vest a general right to information in the public. Rather, the statute was designed to protect individual privacy by focusing agency analysis and improving internal agency decision-making.”²² Thus, Section 208 does not create a private right of action.²³

The E-Government Act also contains provisions regarding the protection of personal information contained in court filings that, while not directly applicable to rulemaking proceedings, may provide useful guidance regarding practices to protect privacy interests. Section 205 provides that “[t]he Supreme Court shall prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically” and authorized the Judicial Conference to issue interim rules.²⁴ “To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record.”²⁵ The Court fulfilled this responsibility through additions to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Bankruptcy Procedure, and rules adopted by specialized courts.²⁶

While the lack of a private cause of action means that there are no cases interpreting agencies’ obligations under Section 208 of the Act, judicial rules that resulted from the Act can provide guidance. The implementation of Section 205 required the Supreme Court to use its authority to “prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.”²⁷ The courts’ rules created to fulfill this responsibility follow largely the same form. For example, the Federal Rules of Civil Procedure provide that electronic or paper filings

contain[ing] an individual’s social security number, taxpayer-identification number, or birth date, the name of an individual known to

19. § 208(b)(1)(A)(i)–(ii), (b)(1)(B)(ii)–(iii), 116 Stat. at 2921–22 (codified at 44 U.S.C. § 3501 note); *see also* JOSHUA R. BOLTEN, OFF. OF MGMT. & BUDGET, OMB GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 (2003).

20. For an example of a Privacy Impact Assessment, *see* U.S. ENV’T PROT. AGENCY, PRIVACY IMPACT ASSESSMENT (2012), https://www.epa.gov/sites/production/files/2014-03/documents/erulemaking-pia_0.pdf [<https://perma.cc/DM4T-QKA3>].

21. § 208(c)(1)(A), 116 Stat. at 2923 (codified at 44 U.S.C. § 3501 note).

22. *E.g.*, *Elec. Priv. Info. Ctr. v. U.S. Dep’t of Com.*, 928 F.3d 95, 103 (D.C. Cir. 2019).

23. *See, e.g.*, *Elec. Priv. Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 266 F. Supp. 3d 297, 315 (D.D.C. 2017).

24. § 205(c)(3)(A)(i), (c)(3)(B)(i), 116 Stat. at 2914 (codified at 44 U.S.C. § 3501 note).

25. § 205(c)(3)(A)(iv), 116 Stat. at 2914 (codified at 44 U.S.C. § 3501 note).

26. FED. R. CIV. P. 5.2; FED. R. CRIM. P. 49.1; FED. R. BANKR. P. 9037; FED. CL. R. 5.2; CT. INT’L TRADE R. 5.2.

27. § 205(c)(3)(A)(i), 116 Stat. at 2914 (codified at 44 U.S.C. § 3501 note).

be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.²⁸

The Federal Rules of Criminal Procedure and the rules of procedure for the federal appellate courts, bankruptcy courts, Court of Federal Claims, and U.S. Court of International Trade either explicitly include nearly identical language or incorporate it by reference.²⁹ The Federal Rules of Criminal Procedure also permit the inclusion of a fifth type of information: "the city and state of the home address."³⁰ For Social Security and immigration cases, electronic access is limited to the parties and their attorneys, with others having to consult the full record at the courthouse.³¹ The obligation to redact applies even when individuals whose PII is included in the filing have not requested redaction and may not even be aware of the filing.³²

The rule provides a few exemptions where redaction is not necessary, including the "record of an administrative or agency proceeding."³³ People making the filing have the option to file an unredacted copy under seal.³⁴ Courts may also "order that a filing be made under seal without redaction," "require redaction of additional information" or "limit or prohibit a nonparty's remote electronic access to a document filed with the court."³⁵ The Advisory Committee for the Federal Rules of Criminal Procedure noted that it was wary of attempts to fully seal the records.³⁶

Case law applying these rules have held that credit card claimholders may proceed without disclosing "a debtor's full account number"³⁷ and precluded disclosure of Social Security numbers under the National Voter Registration Act.³⁸ Courts have often been hesitant to redact information not listed in the rule. For example, the Court

28. FED. R. CIV. P. 5.2(a).

29. FED. R. CRIM. P. 49.1(a)(1)–(4); FED. R. APP. P. 25(a)(5); FED. R. BANKR. P. 9037(a); FED. CL. R. 5.2(a); CT. INT'L TRADE R. 5.2(a).

30. FED. R. CRIM. P. 49.1(a)(5).

31. FED. R. CIV. P. 5.2(c) (establishing this rule for Social Security appeals and immigration cases); FED. R. CRIM. P. 49.1(c) (providing that immigration cases be governed by Federal Rule of Civil Procedure 5.2).

32. *See* Cline v. Ballard, 528 F. Supp. 2d 634, 636 (S.D. W.Va. 2007).

33. FED. R. CIV. P. 5.2(b)(2); FED. R. CRIM. P. 49.1(b)(2); FED. R. BANKR. P. 9037(b)(2); FED. CL. R. 5.2(b)(2).

34. FED. R. CIV. P. 5.2(f); FED. R. CRIM. P. 49.1(f); FED. R. BANKR. P. 9037(e); FED. CL. R. 5.2(f); CT. INT'L TRADE R. 5.2(d).

35. FED. R. CIV. P. 5.2(d)–(e); FED. R. CRIM. P. 49.1(d)–(e); FED. R. BANKR. P. 9037(c)–(d); FED. CL. R. 5.2(d)–(e); CT. INT'L TRADE R. 5.2(b)–(c).

36. FED. R. CRIM. P. 49.1 advisory committee's notes; *accord* Crossman v. Astrue, 714 F. Supp. 2d 284, 290 (D. Conn. 2009) (citing FED. R. CIV. P. 5.2 and expressing similar skepticism regarding a blanket order to file documents under seal in the civil context).

37. *In re* Burkett, 329 B.R. 820, 831 (Bankr. S.D. Ohio 2005).

38. *See* Project Vote/Voting for Am., Inc. v. Long, 752 F. Supp. 2d 697, 711–12 (E.D. Va. 2010) (citing the E-Government Act as support for the proposition that "SSNs are uniquely sensitive and vulnerable to abuse, such that a potential voter would understandably be hesitant to make such information available for public disclosure").

of Federal Claims granted a request to redact a minor child's birthdate and to reduce the child's name to initials, but denied a request to redact all medical information.³⁹

These rules are not binding on agencies. Indeed, the exemption for records of administrative or agency proceedings largely dictates that the contents of public rulemaking dockets mostly fall outside their scope. That said, the scope of the judicial redaction requirements can provide useful guidance to agencies attempting to manage the scope, disclosure, and withholding in public rulemaking dockets. In particular, it highlights the importance of protecting Social Security numbers, birthdates, financial account numbers, and addresses and the potential benefits of giving those submitting information the option of submitting both public copies and redacted copies under seal.

B. Executive Order No. 13,563

Executive Order No. 13,563 on "Improving Regulation and Regulatory Review" imposed a number of requirements designed "to improve regulation and regulatory review."⁴⁰ Section 1 establishes "public participation and an open exchange of ideas" as one of the "General Principles of Regulation."⁴¹

Section 2 provides that "[r]egulations shall be adopted through a process that involves public participation" and "shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."⁴² To effectuate these goals, "each agency . . . shall endeavor to provide the public with an opportunity to participate in the regulatory process" and "shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation."⁴³ In addition, "each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov . . . in an open format that can be easily searched and downloaded."⁴⁴ Furthermore, "such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket."⁴⁵

C. The Administrative Procedure Act

The APA provides additional statutory guidance as to what must be made public during a rulemaking. Section 553 requires agencies to publish NPRMs in the *Federal Register*⁴⁶ and give interested persons the opportunity to participate in the rulemaking

39. *Langland ex rel. M.L. v. Sec'y of Health & Human Servs.*, No. 07-36V, 2011 WL 802695, at *10 (Fed. Cl. Feb. 3, 2011).

40. Exec. Order No. 13,563, 3 C.F.R. § 215 (2012), *reprinted in* 5 U.S.C. § 601 app. at 836-37 (2018).

41. *Id.* § 1(a).

42. *Id.* § 2(a).

43. *Id.* § 2(b).

44. *Id.*

45. *Id.*

46. 5 U.S.C. § 553(b).

process by submitting comments about the proposed rule.⁴⁷ Moreover, “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”⁴⁸

Like the federal government, courts have recognized the critical role that comments and the required response to those comments in the statement of basis and purpose play in making clear “what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”⁴⁹ The “degree of public awareness, understanding, and participation commensurate with the complexity and intrusiveness of the resulting regulations” is what justifies “entrust[ing] the Agency with wide-ranging regulatory discretion.”⁵⁰

The D.C. Circuit has noted how agencies depend on “an exchange of views, information, and criticism between interested persons and the agency” and “a dialogue among interested parties through provisions for comment, reply-comment, and subsequent oral argument” to inform their decision-making.⁵¹ That is why the Supreme Court has observed that “the notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation”⁵² and regards having undergone the notice-and-comment process as a key consideration when determining when an agency’s decision will receive *Chevron* deference.⁵³

In addition to the direct obligations imposed by 5 U.S.C. § 553, the judicial review provisions contained in the APA also have an effect on agency disclosure. Section 706 authorizes courts to “hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁵⁴ The statute further requires that courts conduct their review on the basis of “the whole record.”⁵⁵ Courts have held that “[t]he whole record in an informal rule-making case” includes “comments received.”⁵⁶ Failure to gather and disclose comments can be a basis for granting a petition for review.⁵⁷ In addition, giving

47. *Id.* § 553(c).

48. *Id.*

49. *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (quoting this language from *Boyd* with approval).

50. *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1028 (D.C. Cir. 1978); *id.* at 1027–28 (quoting *Boyd*, 407 F.2d at 308) (noting that “the degree of openness, explanation, and participatory democracy required by the APA” is what “negate[s] the dangers of arbitrariness and irrationality in the formulation of rules”).

51. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35, 55 (D.C. Cir. 1977); see David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 *IND. L.J.* 101, 107–08 (1976) (noting how the “system of peer review and public oversight” provided by the notice-and-comment process plays a key role in improving agency decision-making).

52. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

53. See *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

54. 5 U.S.C. § 706(2)(A).

55. *Id.* § 706.

56. *Rodway v. U.S. Dep’t of Agric.*, 514 F.2d 809, 817 (D.C. Cir. 1975); see *ADMIN. CONF. U.S.*, *supra* note 9, at 4, 8 ¶ 1.

57. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 534–35 (D.C. Cir. 1978); *Rodway*, 514 F.2d at 816–17.

others the opportunity to respond to arguments raised in comments or hearings is “salutary” if not strictly required and makes it more likely that the court will have the full range of points of view necessary to conduct proper judicial review.⁵⁸

Though the courts have elucidated persuasive reasons to provide for full disclosure, deeply personal information requires a different balance. The D.C. Circuit’s decision in *HBO v. FCC* presented both considerations. On the one hand, the process of “comment, reply-comment, and subsequent oral argument” seen as critical to assuring sound administrative decision-making requires that the public have broad access to the comments submitted during rulemaking proceedings.⁵⁹ At the same time, the *HBO* court found it “conceivable that trade secrets or information affecting national defense, if proffered as the basis for rulemaking, should be kept secret.”⁶⁰ The Second Circuit, while recognizing the need for public disclosure of the scientific research on which an agency based its rule, also parenthetically recognized “an exception for trade secrets or national security.”⁶¹ A later D.C. Circuit decision was less equivocal: “Of course, an agency may decline to include confidential business information in the public administrative record in certain narrow situations, as long as it discloses as much information publicly as it can.”⁶² Consistent with this observation, the Seventh Circuit upheld an agency decision based in part on a spreadsheet locked into a particular configuration so long as it gave commenters reasonable opportunity to engage with the data.⁶³

Together these decisions indicate that agencies have some latitude to withhold CBI in appropriate circumstances without violating the APA. Agencies exercising this discretion should strive to disclose as much information as possible and provide sufficient information to permit the public to respond meaningfully to the proposed agency action.

D. The Government in the Sunshine Act

The Government in the Sunshine Act “declare[s] it to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.”⁶⁴ As the Senate Report observed, the statute was designed to ensure that the “government should conduct the public’s business in public.”⁶⁵ It is based on the belief that “increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government

58. *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

59. 567 F.2d 9, 55 (D.C. Cir. 1977).

60. *Id.* at 57 n.130.

61. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

62. *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 745 (D.C. Cir. 2017).

63. *See Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654, 670–71 (7th Cir. 2016).

64. Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (1976) (codified at 5 U.S.C. § 552b note).

65. S. REP. NO. 94-354, at 1 (1975); *see also* H.R. REP. NO. 94-880, at 2–4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2184–86.

programs and policies, and promote cooperation between citizens and government,” ultimately “mak[ing] government more fully accountable to the people.”⁶⁶

As a result, the Sunshine Act requires that agency members generally “jointly conduct or dispose of agency business” through meetings that are “open to public observation.”⁶⁷ The Act went beyond FOIA by omitting a deliberative process exemption and thereby extending transparency requirements to predecisional deliberations.⁶⁸

At the same time, the need “to provide the public with such information” must be balanced against “protecting the rights of individuals and the ability of the Government to carry out its responsibilities.”⁶⁹ As a result, the open meeting obligations of the Sunshine Act are subject to a number of statutory exemptions.⁷⁰ Exemption 4 authorizes the withholding of “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” while Exemption 6 allows the withholding of “information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.”⁷¹ The language of these exemptions mirrors the FOIA exemptions discussed below.

Judicial decisions have observed that the Sunshine Act strikes a balance between openness in government on the one hand and “legitimate governmental and private interests [that] could be harmed by release of certain types of information” on the other.⁷² Because the statute proceeds from a strong presumption that agency meetings should be held in the open, a meeting can be held in private only if holding it in public would disclose information falling within one of the statutory exemptions, with the agency bearing the burden of proof of showing the need to withhold and with the exemptions being narrowly construed.⁷³ Even when one of the exemptions applies, only the portion of the meeting in which that information is disclosed can be held in private, with the remainder of the meeting having to be held in open session.⁷⁴

Because the Sunshine Act exemptions are nearly identical to the FOIA exemptions, courts interpret the parallel exemptions in both statutes according to the same principles and have cited judicial precedent interpreting the parallel provision in each statute interchangeably.⁷⁵ Thus, as is the case with the Privacy Act and the

66. *Common Cause v. Nuclear Regul. Comm’n*, 674 F.2d 921, 928 (D.C. Cir. 1982).

67. 5 U.S.C. § 552b(b).

68. *Common Cause*, 674 F.2d at 929.

69. § 2, 90 Stat. at 1241.

70. 5 U.S.C. § 552b(c).

71. *Id.* § 552b(c)(4), (6).

72. *McKinley v. FDIC*, 756 F. Supp. 2d 105, 113 (D.D.C. 2010) (internal quotation marks omitted).

73. *Common Cause*, 674 F.2d at 928–29; *see also McKinley*, 756 F. Supp. 2d at 113, 115 (construing the Sunshine Act and FOIA exemptions together).

74. *Common Cause*, 674 F.2d at 929.

75. *See id.* at 929 & n.21 (noting that “[i]n general the Sunshine Act’s exemptions parallel those in the Freedom of Information Act (FOIA)” and that “[o]f the nine exemptions to the Freedom of Information Act, seven are included virtually verbatim in the Sunshine Act”); *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 770 (D.C. Cir. 1978) (holding that the Sunshine Act exemptions and the FOIA exemptions to be *in pari materia*). On Exemption 4, *see McKinley*, 756 F. Supp. 2d at 114 (noting that “FOIA’s Exemption 4 and the Sunshine Act’s Exemption 4 . . . are identical” and invoking FOIA decisions as precedent in Sunshine Act

Trade Secrets Act discussed below, interpretation of the Sunshine Act exemptions will likely follow the jurisprudence on the FOIA exemptions.

E. The Privacy Act

The preamble to the Privacy Act reflects the concern that the growing use of computers may have an adverse effect on individual privacy. The findings contained within the preamble state that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies” and that “the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur.”⁷⁶ As a result, “it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.”⁷⁷

The statute’s purpose is “to provide certain safeguards for an individual against an invasion of personal privacy” by, among other things, “permit[ting] an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent” and “permit[ting] exemptions . . . only in those cases where there is an important public policy need for such exemption as has been determined by the specific statutory authority.”⁷⁸ As the Supreme Court has noted, the Privacy Act represents Congress’s recognition that “a strong privacy interest inheres in the nondisclosure of compiled computerized information.”⁷⁹

The statute prohibits agencies from “disclos[ing] any record which is contained in a system of records . . . to any person, or to another agency” without the “prior written consent of . . . the individual to whom the record pertains.”⁸⁰ A “record” is:

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

cases). On Exemption 6, see Applicability of the Fed. Advisory Comm. Act to Nat’l Endowment for Humanities, 4B Op. O.L.C. 743, 747 n.8 (1980) (“The balancing analysis required under the Sunshine Act’s privacy exemption, 5 U.S.C. § 552b(c)(6), is essentially similar to that required under the privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), except that the latter, dealing with records involves the additional issue whether a document is the type of ‘file’ covered by the exemption.”).

76. Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(1)–(2), 88 Stat. 1896, 1896, *reprinted in* 5 U.S.C. § 552a app. at 790 (2018); *accord* H.R. REP. NO. 93-1416, at 7 (1974) (reporting that the Privacy Act was passed largely out of concern over “the impact of computer data banks on individual privacy.”).

77. § 2(a)(5), 88 Stat. at 1896.

78. *Id.* § 2(b), 2(b)(2), 2(b)(5).

79. U.S. Dep’t of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 766 (1989).

80. 5 U.S.C. § 552a(b).

other identifying particular assigned to the individual, such as a finger or voice print or a photograph.⁸¹

This contrasts with “statistical records,” which are records used “for statistical research or reporting purposes only” and “not used . . . in making determination about an identifiable individual.”⁸²

A system of records is a “a group of any records . . . from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”⁸³ The statute requires all agencies that maintain a system of records to publish a system of records notice (SORN) in the *Federal Register* providing notice to the public of, among other things, the name and location of the system, “categories of individuals on whom records are maintained,” the types of records maintained in the system, and agency procedures where an individual can be notified to change his record.⁸⁴ In addition, the statute requires every agency that maintains a system of records to “establish . . . safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.”⁸⁵

Courts’ constructions of this language have added three important guideposts for determining what constitutes a system of records. First, information about one individual contained in a record about another individual is not contained in a system of records.⁸⁶ For example, information about Jane Doe contained in a record about John Smith is not in a system of records unless the agency had “devised and used an indexing capability” where they could search other individuals’ files for her name, because that information would not be retrieved by Jane Doe’s name.⁸⁷ Second, the mere capability of retrieving information about individuals by their name is not sufficient to turn a group of records into a system of records. The agency must follow an actual practice of retrieving information by an individual’s name.⁸⁸ Third and relatedly, whether a group of records is a system of records depends on whether the agency has gathered the information for the *purpose* of retrieving information by name.⁸⁹

The Privacy Act’s duty to withhold information is subject to a number of statutory exemptions, including an explicit exemption for disclosures mandated under FOIA.⁹⁰

81. *Id.* § 552a(a)(4).

82. *Id.* § 552a(a)(6).

83. *Id.* § 552a(a)(5).

84. *Id.* § 552a(e)(4)(A)–(B), (e)(4)(G).

85. *Id.* § 552a(e)(10).

86. *Baker v. Dep’t of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987).

87. *Id.*

88. *See Henke v. U.S. Dep’t of Com.*, 83 F.3d 1453, 1459–61 (D.C. Cir. 1996); *Baker*, 814 F.2d at 1383–84.

89. *Henke*, 83 F.3d at 1461.

90. 5 U.S.C. § 552a(b)(2).

The Privacy Act provides individuals with a private right of action that allows aggrieved plaintiffs to recover “actual damages.”⁹¹

F. The Trade Secrets Act

In contrast to the other statutes already discussed in this section, which protect PII, the Trade Secrets Act guards against the disclosure of CBI. This provision was initially enacted in 1864 to prevent revenue officials from “divulg[ing] . . . the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of official duties.”⁹² It was amended in 1930 to refer directly to “trade secrets or processes”⁹³ and was consolidated in 1948 with similar provisions applying to the Tariff Commission and the U.S. Department of Commerce (DOC) to form a single provision covering all federal officials.⁹⁴

The Trade Secrets Act makes it a federal crime for federal officers or employees to “publish[], divulge[], disclose[], or make[] known in any manner” information “concern[ing] or relat[ing] to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association” that they come across during the course of their official duties.⁹⁵ Importantly, this prohibition applies only to disclosures “not authorized by law.”⁹⁶ The Trade Secrets Act does not create a private right of action.⁹⁷

A key issue confronting agencies handling CBI is how to balance the Trade Secrets Act’s mandate of withholding CBI with FOIA’s policy of broad disclosure. The legislative history generated when the Sunshine Act amended FOIA Exemption 3⁹⁸ provides important guidance on how to read these statutes together:

[T]he Trade Secrets Act, 18 U.S.C. § 1905, which relates only to the disclosure of information where disclosure is “not authorized by law,” would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come

91. *Id.* § 552a(g)(4)(A); *accord* Doe v. Chao, 540 U.S. 614, 614 (2004).

92. Revenue Act of 1864, ch. 173, § 38, 13 Stat. 223, 238.

93. Tariff Act of 1930, ch. 497, § 335, 46 Stat. 590, 701.

94. Act of June 25, 1948, ch. 645, § 1905, 62 Stat. 683, 791.

95. 18 U.S.C. § 1905.

96. *Id.*

97. Chrysler Corp. v. Brown, 441 U.S. 281, 316–17 (1979).

98. Exemption 3 of FOIA allows withholding of information “specifically exempted from disclosure by statute” if a statute either “requires that” matters be withheld . . . with no discretion or “establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld,” such information is exempt from FOIA. 5 U.S.C. § 552(b)(3)(A)(i)–(ii). For example, 26 U.S.C. § 6103 prevents the Internal Revenue Service from disclosing certain tax information, including Taxpayer Identification Numbers. *See* Church of Scientology v. Internal Revenue Serv., 484 U.S. 9, 15 (1987). For the purposes of this project, if there is any other type of specific statute *requiring* the withholding of information, such information can be exempt from FOIA requests.

within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding⁹⁹

This language provides a straightforward way to reconcile these statutes. In the words of the First Circuit, “if the government cannot prove that the requested documents are within FOIA Exemption 4, their disclosure will not violate section 1905. If the documents are found to be exempt from disclosure under the FOIA, they will not be disclosed and no question will arise under section 1905.”¹⁰⁰ The Supreme Court has recognized that slight differences in the language of the Trade Secrets Act and FOIA Exemption 4 leaves open the “theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905.”¹⁰¹ The Court noted, however, “that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.”¹⁰²

Thus, as was the case with the Privacy Act and the Sunshine Act, an analysis of agencies’ duties under FOIA effectively resolves the scope of the duties to withhold information under the Trade Secrets Act. Any information that must be disclosed under FOIA necessarily falls outside the Trade Secrets Act.

G. The Freedom of Information Act

The most instructive body of law to provide interpretive guidance as to how to strike the proper balance between disclosure and withholding is the corpus of judicial opinions interpreting the FOIA exemptions. Although FOIA does not directly regulate disclosure during the rulemaking process, it does provide an independent cause of action that any person can use to require agencies to disclose information obtained during the rulemaking process. For our purposes, it also provides neat guidelines regarding the types of information that are personal or confidential enough to be exempt from public review. FOIA encourages openness by requiring agencies to release all records, information, and documents that are not covered by specific exemptions.¹⁰³ Not only does it require disclosure of rules of procedure, opinions, interpretations, and statements of policy in the *Federal Register*; it mandates that “each agency, upon any request for records . . . , shall make the records promptly available to any person” so long as the request reasonably describes such records and “is made in accordance with published rules . . . and procedures.”¹⁰⁴

The Supreme Court has long recognized that FOIA is “[w]ithout question . . . broadly conceived” and “seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”¹⁰⁵ The hope

99. H.R. REP. NO. 94-880, at. 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2205.

100. 9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 12 (1st Cir. 1983).

101. *Brown*, 441 U.S. at 319 n.49.

102. *Id.*

103. *See* 5 U.S.C. § 552.

104. *Id.* § 552(a)(3)(A).

105. *EPA v. Mink*, 410 U.S. 73, 80 (1973).

is that more fulsome disclosure will “pierce the veil of administrative secrecy and . . . open agency action to the light of public scrutiny.”¹⁰⁶ Such transparency will lead to better decision-making and “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹⁰⁷

However, “[a]t the same time that a broad philosophy of ‘freedom of information’ is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files.”¹⁰⁸ Thus, to protect the “legitimate governmental and private interests [that] could be harmed by release of certain types of information,”¹⁰⁹ FOIA includes nine specific exemptions delineating circumstances under which disclosure can be refused.¹¹⁰

The existence of these exemptions should “not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”¹¹¹ The Supreme Court has recognized that FOIA’s “basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.’”¹¹² Accordingly, the statute specifies that these exemptions are comprehensive¹¹³ and that “the burden is on the agency to sustain its action.”¹¹⁴ To further promote disclosure, the Supreme Court has approved of establishing discrete categories of exempt information, as opposed to a case-by-case analysis.¹¹⁵ FOIA is thus a “scheme of categorical exclusion” that does “not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.”¹¹⁶ And the Supreme Court has repeatedly emphasized that the categories created by these exemptions must be “narrowly construed,”¹¹⁷ though it cannot “arbitrarily constrict” exemptions by adding additional limitations not found within the language of FOIA.¹¹⁸

FOIA’s structure, which provides for a general duty to disclose cabined by strictly limited exemptions, represents a carefully considered balance between the right of the public to know what their government is up to and the often-compelling interest that the government maintains in keeping certain information private.¹¹⁹ As a result, FOIA mandates a “strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents.”¹²⁰ Congress

106. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting the decision below with approval).

107. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

108. S. REP. NO. 89-813, at 3 (1965).

109. *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

110. 5 U.S.C. § 552(b)(1)–(9).

111. *Rose*, 425 U.S. at 361.

112. *Id.* at 360–61 (quoting S. REP. NO. 89-813, at 3 (1965)).

113. *See* § 552(d) (noting in the Act should not be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated”).

114. *Id.* § 552(a)(4)(B).

115. *See* U.S. Dep’t of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 779 (1989).

116. *FBI v. Abramson*, 456 U.S. 615, 631 (1982).

117. *Id.* at 630; *Rose*, 425 U.S. at 361.

118. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

119. *See* *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53 (1989).

120. *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

(and the courts) have “repeated[ly] reject[ed] . . . any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague ‘public interest’ standard.”¹²¹

In some instances, agencies can still use their discretion to disclose information under FOIA even if such information is covered by an exemption. The application of FOIA exemptions is discretionary, not mandatory, and “Congress did not design the FOIA exemptions to be mandatory bars to disclosure.”¹²² However, agencies are limited to making discretionary disclosures only in cases where “they are not otherwise prohibited by law from doing so.”¹²³ As explored above, for Exemption 4, the law prohibiting disclosure would be the Trade Secrets Act. For Exemption 6, it is the Privacy Act. An agency’s ability to use its discretion to disclose information under Exemptions 4 and 6 is discussed below.

1. Exemption 4

Exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹²⁴ The Senate Committee on the Judiciary stated that Exemption 4 would cover “business sales statistics, inventories, customer lists, and manufacturing processes” and “information which is given to an agency in confidence, since a citizen must be able to confide in his Government.”¹²⁵ “[W]here the Government has obligated itself in good faith not to disclose documents or information which it receives,” they declared, “it should be able to honor such obligations.”¹²⁶

Although the definition of trade secrets is relatively clear, until recently what constituted “commercial or financial information obtained from a person and privileged or confidential” within the meaning of Exemption 4 was less clear.¹²⁷ The Supreme Court’s 2019 decision in *Food Marketing Institute v. Argus Leader Media* identified two conditions for determining when information is confidential: (1) whether the information is “closely held,” in that it is not shared freely; and (2) whether it is disclosed “only if the party receiving it provides some assurance that it will remain secret.”¹²⁸ In so holding, the Court declined to resolve whether both were necessary and rejected a line of authority initiated by the D.C. Circuit’s decision in

121. Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979).

122. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

123. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: WAIVER & DISCRETIONARY DISCLOSURE 16 (2019), <https://www.justice.gov/oip/page/file/1198006/download> [<https://perma.cc/5ASS-D7SE>].

124. 5 U.S.C. § 552(b)(4).

125. S. REP. NO. 89-813, at 9 (1965).

126. H.R. REP. NO. 89-1497, at 10 (1966).

127. 5 U.S.C. § 552(b)(4).

128. 139 S. Ct. 2356, 2363 (2019). The Supreme Court cited with approval a Ninth Circuit decision concluding that Exemption 4 “would ‘protect information that a private individual wishes to keep confidential for his own purposes but reveals to the government under the express or implied promise’ of confidentiality.” *Id.* (quoting *Gen. Servs. Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969)).

National Parks & Conservation Ass'n v. Morton that added the further requirement that the disclosure of the information would cause substantial competitive harm.¹²⁹

In determining what constitutes sufficient assurances of confidentiality under the second step of the analysis, the Court recognized that such assurances can be implied or express.¹³⁰ Such assurances can be implied, however, only if expectations of privacy are reasonable.¹³¹

District courts have further clarified this ruling, establishing that only information “originating from the companies themselves” can be information that is customarily and actually kept private.¹³² Courts also consider the steps that business owners took to keep information private.¹³³ Additionally, Exemption 4 is intended to allow the government to honor any good faith promises it has made not to disclose certain documents.¹³⁴ The failure to invoke available mechanisms for protecting CBI constitutes a waiver of rights to confidential treatment under Exemption 4.¹³⁵

Because the *Food Marketing Institute* decision is new, the doctrine will likely develop as courts began to interpret it. In any event, even if certain information in a document is exempt, nonexempt portions of a document “must be disclosed unless they are inextricably intertwined with exempt portions.”¹³⁶

The Administrative Conference of the United States and the Executive Branch have spent years considering how to balance CBI with public disclosure. In 1987, President Reagan issued Executive Order 12,600, which required all agencies subject to FOIA to promulgate regulations to give certain procedural protections to those submitting “confidential commercial information.”¹³⁷ In particular, agency heads must establish procedures to allow the submitters of confidential commercial information to designate what information would cause the submitted “substantial competitive harm” if disclosed.¹³⁸ If such information is requested under FOIA, the agency must then notify the submitter.¹³⁹ Notably, however, the notice requirements need not be followed if “[t]he information has been published or has been officially made available to the public” or if “[t]he information requested is not designated by

129. *Id.* at 2363–65 (abrogating *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)).

130. *See id.* at 2363.

131. U.S. Dep't of Just. v. *Landano*, 508 U.S. 165, 179 (1993) (holding that “an implied assurance of confidentiality” may be reasonably inferred under FOIA Exemption 7(D) based on certain “generic circumstances”), *cited with approval by* *Food Mktg. Inst.*, 139 S. Ct. at 2363–64.

132. *E.g.*, *Am. Small Bus. League v. U.S. Dep't of Def.*, 411 F. Supp. 3d 824, 830 (N.D. Cal. 2019).

133. *See, e.g.*, *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 790 Fed. Appx. 134, 136 (9th Cir. 2020) (remanding due to a lack of evidence regarding “what specific steps each producer took to keep its information confidential”).

134. *See supra* note 125 and accompanying text.

135. *Gulf & W. Indus., Inc. v. United States*, 615 F.2d 527, 533 n.11 (D.C. Cir. 1979).

136. *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

137. Exec. Order No. 12,600, 3 C.F.R. 235 (1987).

138. *Id.* § 3(a)(ii).

139. *Id.* § 6.

the submitter as exempt from disclosure” when the submitter had an opportunity to do so.¹⁴⁰

Note that most information falling under Exemption 4 is not appropriate for discretionary disclosure by an agency. If an agency decides to disclose information falling under Exemption 4, businesses can bring a reverse FOIA suit¹⁴¹ alleging that disclosure of material covered by the Trade Secret Act would be “arbitrary [and] capricious” or “not in accordance with law” under the APA.¹⁴² Thus, “in the absence of a statute or properly promulgated regulation giving an agency authority to release the information—which would remove the Trade Secrets Act’s disclosure prohibition—a determination that requested material falls within Exemption 4 is tantamount to a determination that the material cannot be released, because the Trade Secrets Act ‘prohibits’ disclosure.”¹⁴³ In other words, if a company properly submits information confidentially and retains its privilege, agencies cannot exercise discretion to disclose it in the absence of an approving statute.

2. Exemption 6

Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁴⁴ The primary purpose of Exemption 6, per the Supreme Court’s reading of the legislative history, is “to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”¹⁴⁵ Similar files include “government records on an individual which can be identified as applying to that individual.”¹⁴⁶ This includes email addresses.¹⁴⁷ If the information is contained within a “similar file,” courts then consider whether or not the disclosure would amount to an “unwarranted invasion of personal privacy.”¹⁴⁸ The Court has also made clear that the term should be read expansively rather than narrowly.¹⁴⁹ Though Exemption 6 explicitly refers to types of files, the Court has also held that “the protection of Exemption 6 is not determined merely by the nature of the file in which the requested information is contained.”¹⁵⁰ Information should not lose the protection

140. *Id.* § 8(b), (c).

141. A reverse FOIA suit is one where a “submitter of information—usually a corporation or other business entity required to report various and sundry data on its policies, operations, or products—seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter’s FOIA request.” *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987).

142. 5 U.S.C. § 706(2)(A).

143. U.S. DEP’T OF JUSTICE, OFFICE OF INFO. POLICY, GUIDE TO THE FREEDOM OF INFORMATION ACT 869–70 (2009); *CNA Fin. Corp.*, 830 F.2d at 1151–52.

144. 5 U.S.C. § 552(b)(6).

145. *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982).

146. *Prechtel v. FCC*, 330 F. Supp. 3d 320, 329 (D.D.C. 2018) (quoting *Wash. Post*, 456 U.S. at 595).

147. *Id.*

148. *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *see, e.g., Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121, 1125 (D. Or. 2009).

149. *Wash. Post*, 456 U.S. at 600.

150. *Id.* at 601.

of Exemption 6 merely because they are stored in different types of files than personnel and medical.¹⁵¹

If the information is contained within a “similar file[],” the statute further requires courts to determine whether “the disclosure of [that information] would constitute a clearly unwarranted invasion of personal privacy.”¹⁵² Courts making this determination must balance the public interest in disclosure against the privacy interest of the individual,¹⁵³ bearing in mind that “under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.”¹⁵⁴

The public’s interest in disclosure turns on whether disclosure would “contribute significantly to public understanding of the operations or activities of the government.”¹⁵⁵ Courts applying this standard have ruled that the interest in disclosure is particularly strong in the context of rulemaking. For example, in ordering the disclosure of the email addresses from which bulk comments were submitted in a rulemaking hearing, one court held that “disclosing the identities of those seeking to influence an agency’s actions can shed light on those actions.”¹⁵⁶ Another court mandating the disclosure of commenters’ names and addresses similarly held that “the public has much to learn about [the agency’s] rulemaking process from the disclosure of commenters’ names and addresses,” including whether “multiple comments [have been] submitted by a single contributor” and whether the agency gave greater weight to residents living near the affected region.¹⁵⁷ Thus, “[a]n agency decision formulating a final rule, which relies in part on written comments submitted by members of the public, clearly warrants full disclosure of those comments.”¹⁵⁸ Courts have been less willing to disclose names and addresses when there is no indication of “any apparent significance attached to individual commenters’ geographical locations.”¹⁵⁹

On the other hand, commenters’ privacy interest in their names and addresses are particularly weak for voluntary submissions when the portal for submission gave commenters notice that the submission would be made available to the public¹⁶⁰ and the commenter did not avail themselves of available measures to protect their

151. *Id.*

152. 5 U.S.C. § 552(b)(6).

153. *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999).

154. *Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982).

155. *U.S. Dep’t of Just. v. Reps Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

156. *Prechtel v. FCC*, 330 F. Supp. 3d 320, 330 (D.D.C. 2018).

157. *All. for Wild Rockies v. Dep’t of Interior*, 53 F. Supp. 2d 32, 37 (D.D.C. 1999).

158. *Id.*

159. *Prechtel*, 330 F. Supp. 3d at 331 (quoting *People for Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 307 n.8 (D.D.C. 2007)).

160. *Id.* at 329 (“The bulk submitters’ privacy interest in their email addresses is minimal in this context. Importantly, bulk submitters had ample indication that their email addresses could be made public, mitigating any expectation of privacy.”); *id.* at 330 (“[W]hen someone submits multiple comments to influence public policy and is told that her email address will become part of the public record, her privacy interest in that email address is not as strong as the Commission now suggests.”).

privacy.¹⁶¹ After all, privacy under FOIA can undoubtedly be waived.¹⁶² Note, however, that commenters (or agents) cannot waive the privacy on behalf of third parties.¹⁶³

Courts also consider the consequences and possible injuries for potentially identified individuals whose information is disclosed. The “scope of the privacy interest” is far greater when the consequences include, for example, “identity theft and other forms of fraud” as opposed to mere embarrassment.¹⁶⁴ The possibility of mistreatment, harassment, or retaliation that could occur from disclosure of identities is also considered.¹⁶⁵ Even increased exposure to solicitors trying to sell something has been considered an unwarranted invasion of privacy.¹⁶⁶

Identifying information must be weighed “not only from the viewpoint of the public, but also from the vantage of those who would have been familiar . . . with other aspects of” the individual’s life.¹⁶⁷ Even if someone could not identify an individual merely by the documents being disclosed, courts must also consider whether someone who knew a few more details about the individual’s life could essentially put two and two together.¹⁶⁸ Thus, the concern over unwarranted disclosure of private information is not with the identifying information on its face, but rather with the practical impact of the disclosure, including “the connection between such information and some other detail—a statement, an event, or otherwise—which the individual would not wish to be publicly disclosed.”¹⁶⁹ After all, as the Court has noted, no one can guarantee that those “in the know will hold their tongues.”¹⁷⁰ The Court has also noted that, in an organized society, privacy rights instead depend on the degree of dissemination and the extent to which time has rendered previously disclosed information private.¹⁷¹

Applying these criteria, courts have considered records that contain information such as “place of birth, date of birth, date of marriage, employment history, and

161. *All. for Wild Rockies*, 53 F. Supp. 2d at 37 (“[The agency] made it abundantly clear in its notice that the individuals submitting comments to its rulemaking would not have their identities concealed. Had defendants intended otherwise, they could have taken efforts at the time the notice was published to assure commenters that their responses would be confidential or to offer them the opportunity to request anonymity.”).

162. *Comput. Prof’ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996).

163. *See Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 359 (5th Cir. 2001) (“[W]e . . . reject Sherman’s argument that the Army has the power to waive the privacy interest of service personnel in limiting the disclosure of their social security numbers . . .”).

164. *Id.* at 365.

165. *See U.S. Dep’t of State v. Ray*, 502 U.S. 164, 176–77 (1991) (“[T]he privacy interest in protecting [Haitian nationals who had been denied asylum and returned to Haiti] from any retaliatory action that might result from a renewed interest in their aborted attempts to emigrate must be given great weight.”).

166. *See Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989).

167. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380 (1976).

168. *Id.* at 380–81.

169. *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989).

170. *Rose*, 425 U.S. at 381 (internal quotation marks omitted).

171. *U.S. Dep’t of Just. v. Reps Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989).

comparable data” as “similar files” for the first step of the Exemption 6 analysis.¹⁷² Similarly, Social Security numbers have been held as exempt under FOIA.¹⁷³

Applying the FOIA Exemption 6 balancing test, personal financial information, such as bank numbers or Social Security numbers, are most likely to be exempted from disclosure even when included in public comments. A specific Social Security number or account number would not help inform a citizen of an agency’s actions and would open up the commenter to extreme identity theft risk. In many other situations, however, names, addresses, and other important information included in the comment (like personal medical information) will likely not be exempt. Because these are comments the agency considered, the contents will certainly contribute to public understanding of an agency’s thought process or activities. Note that, since someone cannot waive a third party’s privacy interests, the privacy interest for information submitted by a third party is likely higher than that for information someone submitted about themselves.

Typically, Exemption 6 information is “not appropriate” for discretionary disclosure.¹⁷⁴ As explored above, when the information involved is covered by the Privacy Act, agencies cannot use their discretion to disclose it, as it would be barred by statute. However, in the instances where the Privacy Act does not apply and there has been a waiver, discretionary disclosure may be appropriate. Similarly, reverse FOIA suits regarding Exemption 6 have not always been successful, indicating that circumstances exist under which discretionary disclosure of information falling within FOIA Exemption 6 is appropriate.¹⁷⁵

3. Analysis

These decisions have considerable implications for agencies’ obligations to disclose or withhold comments submitted in public rulemaking dockets. Regarding CBI, *Food Marketing Institute* makes it clear that any information that commenters submit without following the steps needed for confidential submission will fall outside Exemption 4 and be subject to public disclosure under FOIA.

Regarding personal information, the inquiry into whether a disclosure would constitute an unwarranted invasion of privacy requires balancing the public interest in disclosure against the private interest in withholding. In the context of notice-and-comment rulemaking, the public interest in disclosing is strong, and the fact that commenters received notice that their comments will be made public unless they exercise the confidential submission process makes the privacy interest somewhat attenuated. Even in the case of inadvertent submission, the fact that submitters receive warnings about waiver of confidentiality lowers their privacy interests.

172. U.S. Dep’t of State v. Wash. Post Co., 456 U.S. 595, 600 (1982).

173. *Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 359 (5th Cir. 2001).

174. U.S. DEP’T OF JUSTICE, *supra* note 123, at 16.

175. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (denying petitioner’s request to force an agency to withhold under Exemption 6 because FOIA exemptions are discretionary). *But see Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1182 (8th Cir. 2000) (enjoining an agency from withholding information under Exemption 6).

As a result, certain information, such as names and home addresses, may fall outside of Exemption 6 and be subject to disclosure so long as proper disclaimers are presented when people are submitting comments. On the other hand, information such as Social Security numbers or bank account numbers would provide so little benefit in helping the public evaluate comments and carry such a large risk of promoting identity theft that agencies should be permitted to refuse to disclose them. Similar considerations apply to places and dates of birth, dates of marriage, employment history, and comparable data.

H. Synthesizing the Duties and Interpretive Decisions

The body of judicial decisions interpreting the statutes discussed above provide useful guidance for how agencies should give effect to the policy in favor of open government while simultaneously fulfilling agencies' duty to protect certain types of information. Although these statutes contain frameworks for analyzing the relevant tradeoffs that are theoretically distinct, the Privacy Act, the Trade Secrets Act, and the Sunshine Act look to FOIA to provide the relevant principles.

FOIA thus represents the lodestar for determining the proper way for agencies to balance their duties to disclose and their duties to withhold. It reflects a strong, default commitment to full disclosure. Absent specific congressional direction reflected in one of the specified lists of narrowly construed statutory exemptions, the policies in FOIA counsel strongly in favor of disclosure.

Court decisions construing FOIA Exemption 6 provide the most complete exposition of the framework for balancing the public's interest in disclosure against private interests in privacy. Regarding comments submitted during a rulemaking proceeding, disclosure of key information about a comment, including its content and the name and address of the person submitting it, provides important insights that counsel strongly in favor of disclosure.

At the same time, privacy interests are relatively weak for commenters who voluntarily submit comments into a portal containing warnings that all submissions would be publicly available and who did not avail themselves of available measures to protect their privacy. Privacy interests are stronger for information such as Social Security and bank account numbers, place of birth, date of birth, date of marriage, and employment history, because their disclosure would provide few public benefits and raise significant risks of identity theft. In instances where someone's personal information (for example, location, place of birth, or employment history) would provide public benefits, the privacy interest is mixed.¹⁷⁶ In such situations, agencies could redact the information to reduce the risks of identity theft. For example, exact dates of employment could be redacted within the comment, leaving only the years an employee worked there; birth days, but not months, could be redacted.

Agencies can mitigate these risks by making prominent disclosures that comments are generally publicly available and by providing clear instructions for commenters

176. See, e.g., *All. for Wild Rockies v. Dep't of Interior*, 53 F. Supp. 2d 32, 37 (D.D.C. 1999) (holding that disclosure of the names and addresses of private citizens who submitted comments was required because "the public has much to learn about defendants' rulemaking process from the disclosure of commenters' names and addresses").

who wish to make confidential submissions. Both FOIA and the E-Government Act of 2002 suggest that agencies should consider reviewing comments in order to redact Social Security numbers, bank account numbers, birth dates, wedding dates, and comparable data. Addresses may be reduced to city and state in appropriate circumstances. The APA recognizes the discretion for agencies to withhold confidential business data so long as the disclosure is sufficient to provide the public with a meaningful opportunity to engage with the comments.¹⁷⁷

II. AGENCY PRACTICES WITH RESPECT TO DISCLOSING AND WITHHOLDING PROTECTED MATERIALS IN RULEMAKING DOCKETS

The analysis of agencies' legal duties to disclose and withhold protected materials was supplemented by an assessment of real-world agency practices. This research focused on two types of sources. First, we reviewed publicly available materials, including:

- language in NPRMs issued by all Administrative Conference member agencies;
- System of Record Notices (SORNs) issued by all agencies examined; and
- agency web portals for accepting comments in rulemaking proceedings.¹⁷⁸

Second, we gathered information directly from agency officials in three ways:

- a roundtable on January 8, 2020, in which seventeen officials from fourteen agencies participated;
- in-depth interviews with officials from six agencies; and
- a survey of agency practices sent to all Administrative Conference member agencies.¹⁷⁹

The survey generated received twenty-seven responses from twenty-three agencies, although not all respondents answered every question. Seventeen of the responses were from people explicitly identified as attorneys (general counsels, special counsels, and attorneys).

177. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (explaining that information “upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment” and cannot be cherry-picked with redactions).

178. The full analysis of all NPRMs, SORNs, and websites analyzed is available at FINAL REPORT FOR PROTECTED MATERIALS IN PUBLIC RULEMAKING DOCKETS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (November 24, 2020), available at <https://www.acus.gov/report/final-report-protected-materials-public-rulemaking-dockets> [<https://perma.cc/46M3-RT56>].

179. The full survey text is available at *id.* at 116–19.

A. Advance Notice of Policies Governing Protected Materials

One set of survey questions focused on how agencies provide guidance to commenters and other individuals submitting information. Eighteen respondents representing seventeen agencies explained the types of situations in which they give guidance regarding policies on the submission of CBI and PII. Their responses are summarized in Table 1.

Table 1: Ways Surveyed Agencies Provide Advance Disclosures of Policies Regarding CBI and PII

Type	Responses
Notices in NPRMs	17
Notices provided prior to public meetings	6
Guidance provided on websites	4
Notices on surveys	4
Agency regulations	2
Notices provided during negotiated rulemakings	2
Notices regarding ex parte communications	2
Guidance in Systems of Records Notices (SORNs)	1

Seventeen of twenty-seven responses (63%), and all agencies who responded to the question,¹⁸⁰ indicated that they rely on language in NPRMs and Advance NPRMs to notify individuals of their policies regarding withholding and disclosure of CBI and PII. Other mechanisms include notices provided prior to public meetings (six responses/22%), guidance on websites (four responses/14%), notices on surveys (four responses/14%), agency regulations (two responses/7%), notices provided during negotiated rulemakings (two responses/7%), notices regarding ex parte communications (two responses/7%), and guidance in Systems of Records Notices (SORNs) (one response/4%).

1. Notices of Proposed Rulemaking (NPRMs)

The most common practice for providing advance notice of policies regarding the disclosure and withholding of CBI and PII is to include language describing those policies in NPRMs published in the *Federal Register*. To assess this practice, we inspected NPRMs issued by all forty-three agencies examined to assess the disclosures they made about the handling of CBI and PII submitted in comments. The results are summarized in Table 2.

180. Note that one additional agency selected “other,” but did not describe any method aside from saying that it “provides notice.”

Table 2: Terms that Examined Agencies Include in NPRMs to Disclose Policies Regarding CBI and PII

Type	Agencies
Notice that comments will be disclosed to the public	37
Guidance not to include PII/CBI in comments	10
Guidance not to include PII in comments	8
Guidance not to include CBI in comments	1
Guidance regarding alternative mechanisms for submitting PII or CBI	9
Notice of agency discretion to redact information from comments	1
Guidance on how to challenge decisions regarding disclosure or withholding	5

One striking aspect is that guidance regarding protected materials tends to reflect the likelihood that agency will encounter CBI and PII given its particular mission. Agencies that may not typically encounter certain types of information may thus feel no need to notify commenters not to submit it. The following nine agencies include language in their NPRMs directing commenters not to disclose PII without mentioning CBI: Consumer Finance Protection Board (CFPB), National Labor Relations Board (NLRB), Occupational Safety and Health Administration (OSHA), U.S. Department of State (DOS), U.S. Equal Employment Opportunity Commission (EEOC), U.S. Nuclear Regulatory Commission (NRC), U.S. Office of Government Ethics (OGE), and U.S. Securities and Exchange Commission (SEC). Although there are some conspicuous absences,¹⁸¹ many of these appear to be agencies whose work is more likely to encounter personal information. Conversely, the only agency to include language in its NPRM directing commenters not to disclose CBI without mentioning PII is the U.S. Environmental Protection Agency (EPA), which is likely to receive significant amounts of commercially sensitive information, but is unlikely to encounter PII. The implication is that policies regarding the disclosure and withholding of protected materials should give agencies flexibility to modify them to reflect each agency's particular area of responsibility. For example, while a blanket notice for all commenters on commenting websites would be sufficient for every agency no matter what they encounter, policies regarding the challenging of disclosure and withholding or the submission of confidential material may change depending on the volume of information an agency receives.

a. Notices of Public Disclosure of Any Protected Materials Contained in Comments

The survey of agencies' NPRMs reveals that the most common practice is to notify commenters that all submissions will be made available to the public. As

181. One might have expected to find the Centers for Medicare and Medicaid Services (CMS), Department of Veterans Affairs (DVA), and U.S. Office of Personnel Management (OPM) on this list. These three agencies do not provide any guidance about nondisclosure regardless of whether it is PII.

indicated in Table 2, thirty-seven of the forty-three agencies examined (86%) include such disclosures in their NPRMs.

Many agencies disclose that all comments will be made public without making specific reference to PII or CBI. For example, an NPRM issued by the Internal Revenue Service (IRS) simply states, “All comments will be available at <http://www.regulations.gov> or upon request.”¹⁸² But some agencies go slightly further, warning commenters to exercise caution in determining what to submit without mentioning any particular type of information. A recent NPRM issued by the Commodities Futures Trading Commission (CFTC) states, “Comments will be posted as received to <http://www.cftc.gov>. *You should submit only information that you wish to make available publicly.*”¹⁸³ The U.S. Department of Education’s (ED’s) NPRMs provide a slightly longer disclosure along the same lines:

Privacy Note: The Department [of Education]’s policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.¹⁸⁴

These notices sometimes clarify that certain types of information contained in comments will be made available to the public. NPRMs issued by the U.S. Department of Defense (DOD) and the U.S. Office of Personnel Management (OPM) warn that public disclosure of comments will include any “personal identifiers or contact information” contained therein. However, the Center for Medicare & Medicaid Services (CMS) is the only agency to refer to both CBI and PII in its guidance regarding the public disclosure of comments submitted: “All comments received before the close of the comment period are available for viewing by the public, *including any personally identifiable or confidential business information that is included in a comment.*”¹⁸⁵

182. Revised Applicability Dates for Regulations Under Section 382(h) Related to Built-in Gain and Loss, 85 Fed. Reg. 2061, 2063 (proposed Jan. 14, 2020) (to be codified at 26 C.F.R. pt. 1).

183. Certain Swap Data Repository and Data Reporting Requirements, 84 Fed. Reg. 21,044, 21,044 (proposed May 13, 2019) (to be codified at 17 C.F.R. pts. 23, 43, 45 & 49) (emphasis added).

184. Federal Perkins Loan Program, Federal Work-Study Programs, Federal Supplemental Educational Opportunity Grant Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, Teacher Education Assistance for College and Higher Education Grant Program, Federal Pell Grant Program, Leveraging Educational Assistance Partnership Program, and Gaining Early Awareness and Readiness for Undergraduate Programs, 84 Fed. Reg. 67,778, 67,778 (proposed Dec. 11, 2019) (to be codified at 34 C.F.R. pts. 674, 675, 676, 682, 685, 686, 690, 692 & 694).

185. Basic Health Program; Federal Funding Methodology for Program Year 2021, 85 Fed. Reg. 7500, 7501 (proposed Feb. 10, 2020) (to be codified at 42 C.F.R. pt. 600) (emphasis added).

b. Guidance Not to Submit Protected Materials in Comments

Some agencies went beyond a mere warning, providing guidance not to include protected materials in rulemaking submissions. As indicated in Table 2, ten of the forty-three agencies examined (23%) included language in their NPRMs cautioning submitters against including PII or CBI in their comments. An additional eight agencies (19%) made a similar warning limited to PII, with one other agency (2%) offering a similar warning limited to CBI.

Some agencies refer to protected materials generally without referring specifically to PII or CBI. An NPRM issued by the Office of the Comptroller of the Currency (OCC) made a general warning “not [to] include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.”¹⁸⁶

Other agencies referred directly to CBI. A recent NPRM issued by EPA contained the following language: “Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.”¹⁸⁷ Other agencies’ NPRMs gave specific examples of CBI:

- DOC: “business information, or otherwise proprietary, sensitive or protected information.”¹⁸⁸
- U.S. Department of Energy (DOE): “trade secrets and commercial or financial information.”¹⁸⁹
- OMB: “confidential business information, trade secret information, or other sensitive or protected information.”¹⁹⁰
- Federal Election Commission (FEC): “trade secrets or commercial or financial information.”¹⁹¹
- Federal Trade Commission (FTC): “‘trade secret or any commercial or financial information which . . . is privileged or confidential’—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.”¹⁹²

186. Employment Contracts, Mutual to Stock Conversions, Technical Amendments, 85 Fed. Reg. 1052, 1052 (proposed Jan. 8, 2020) (to be codified at 12 C.F.R. pts. 3, 4, 11, 16, 19, 23, 26, 32, 108, 112, 141, 160, 161, 163 & 192).

187. Air Plan Approval; FL; 2010 1-Hour SO₂ NAAQS Transport Infrastructure, 85 Fed. Reg. 7480, 7480 (proposed Feb. 10, 2020) (to be codified at 40 C.F.R. pt. 52).

188. Guidance on Federal Conformity Assessment Activities, 85 Fed. Reg. 7258, 7258 (proposed Feb. 7, 2020) (to be codified at 15 C.F.R. pt. 287).

189. Energy Conservation Program: Energy Conservation Standards for Consumer Refrigerators, Refrigerator-Freezers, and Freezers, 84 Fed. Reg. 62,470, 62,481 (proposed Nov. 15, 2019) (to be codified at 10 C.F.R. pt. 430).

190. OMB Freedom of Information Act Regulation, 83 Fed. Reg. 42,610, 42,610 (proposed Aug. 23, 2018) (to be codified at 5 C.F.R. pt. 1303).

191. Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,864, 12,864 (proposed Mar. 26, 2018) (to be codified at 11 C.F.R. pts. 100 & 110).

192. Military Credit Monitoring, 83 Fed. Reg. 57,693, 57,699 (proposed Nov. 16, 2018)

And as explored in the legal analysis above, DOE disclosure explicitly provided that “[c]omments submitted through <http://www.regulations.gov> cannot be claimed as CBI” and that “[c]omments received through the website will waive any CBI claims for the information submitted.”¹⁹³ One interview participant concurred that commenters that post PII despite these warnings have essentially waived any claims to confidentiality or protection.

Many agencies’ NPRMs advise commenters not to include any PII in their comments. The DOS, NRC, and SEC limit this warning to “identifying or contact information” or “personal identifying information.”¹⁹⁴ Other agencies augment this warning with lists of types of PII:

- CFPB: “account numbers or Social Security numbers, or names of other individuals.”¹⁹⁵
- DOC: “account numbers or Social Security numbers, or names of other individuals.”¹⁹⁶
- FEC: “home street address, personal email address, date of birth, phone number, social security number, or driver’s license number.”¹⁹⁷
- NLRB: “Social Security numbers, personal addresses, telephone numbers, and email addresses.”¹⁹⁸
- OSHA: “Social Security Numbers, birthdates, and medical data.”¹⁹⁹
- OGE: “account numbers or Social Security numbers.”²⁰⁰

(to be codified at 16 C.F.R. pt. 609) (quoting 15 U.S.C. § 46(f)).

193. Energy Conservation Program: Energy Conservation Standards for Consumer Refrigerators, Refrigerator-Freezers, and Freezers, 84 Fed. Reg. at 62,481.

194. List of Approved Spent Fuel Storage Casks, 85 Fed. Reg. 1129, 1129 (proposed Jan. 9, 2020) (to be codified at 10 C.F.R. pt. 72); Modernization of Regulations S-K Items 101, 103, and 105, 84 Fed. Reg. 44,358, 44,358 (proposed Aug. 23, 2019) (to be codified at 17 C.F.R. 229, 239 & 240); International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 83 Fed. Reg. 24,198, 24,198 (proposed May 24, 2018) (to be codified at 22 C.F.R. pts. 121, 123, 124, 126 & 129).

195. Remittance Transfers Under the Electronic Fund Transfer Act, 84 Fed. Reg. 67,132, 67,132 (proposed Dec. 6, 2019) (to be codified at 12 C.F.R. pt. 1005).

196. Guidance on Federal Conformity Assessment Activities, 85 Fed. Reg. 7258, 7258 (proposed Feb. 7, 2020) (to be codified at 15 C.F.R. pt. 287).

197. Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,864, 12,864 (proposed Mar. 26, 2018) (to be codified at 11 C.F.R. pts. 100 & 110).

198. Jurisdiction—Nonemployee Status of University and College Students Working in Connection with Their Studies, 84 Fed. Reg. 49,691, 49,691 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

199. Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 84 Fed. Reg. 53,902, 53,902 (proposed Oct. 8, 2019) (to be codified at 29 C.F.R. pts. 1915 & 1926).

200. Post-Employment Conflict of Interest Restrictions; Departmental Component Designations, 85 Fed. Reg. 7252, 7252 (proposed Feb. 7, 2020) (to be codified at 5 C.F.R. pt. 2641).

- U.S. Social Security Administration (SSA): “Social Security numbers or medical information.”²⁰¹

The NPRMs issued by FTC provide the most complete guidance in this regard:

You are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information.²⁰²

c. Guidance Regarding Alternative Mechanisms for Submitting Comments Containing Protected Materials

Agency practice regarding notice of alternative methods for submitting protected materials varies. Only nine of forty-three agencies examined (21%) provide such guidance in their NPRMs.²⁰³

Some agencies provide quite general guidance, notifying prospective commenters that they may submit their comments anonymously but not elaborating on a process.²⁰⁴ Conversely, other agencies like FTC explain a clear process:

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the . . . General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted . . . [on the public FTC website]—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment [from the FTC website],

201. Advance Designation of Representative Payees for Social Security Beneficiaries, 84 Fed. Reg. 65,040, 65,040 (proposed Nov. 26, 2019) (to be codified at 16 C.F.R. pts. 404, 408 & 416).

202. Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. 58,348, 58,349 (proposed Oct. 31, 2019) (to be codified at 20 C.F.R. pts. 801 & 803).

203. PROTECTED MATERIALS IN PUBLIC RULEMAKING DOCKETS, ADMIN. CONF. U. S. 123 (Nov. 24, 2020), <https://www.acus.gov/report/final-report-protected-materials-public-rulemaking-dockets> [<https://perma.cc/ABT8-JNTL>] (providing a comparison of NPRM language on the disclosure and withholding of protected materials).

204. *Compare* International Traffic in Arms Regulations, 83 Fed. Reg. 24,198, 24,198 (proposed May 24, 2018) (to be codified at 22 C.F.R. pts. 121, 123, 124, 126 & 129), *with* Practices and Procedures, 79 Fed. Reg. 18,658, 18,658 (proposed Apr. 3, 2014) (to be codified at 5 C.F.R. pt. 1201).

unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.²⁰⁵

NPRMs issued by the U.S. Department of Agriculture (USDA) and the U.S. Department of Justice (DOJ) include more specific guidance that requires the commenter to include the phrase “PERSONAL IDENTIFYING INFORMATION” or “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of the comment and prominently identify the information to be redacted from the comment.²⁰⁶ These NPRMs indicate that information properly marked as PII or CBI will not be posted online without mentioning an authority to review whether the redacted material actually constitutes protected information.²⁰⁷

Other agencies like DOE and FDA require commenters seeking confidential treatment to submit both redacted and unredacted versions of comments in written form.²⁰⁸ However, unlike the agencies mentioned above, DOE makes clear that it “will make its own determination about the confidential status of the information and treat it according to its determination.”²⁰⁹

d. Notices of Agency Discretion to Redact Information from Comments

Only one agency (2%) provides explicit advance notice of its discretionary authority to redact comments. A recent NPRM issued by the Commodity Futures Trading Commission (CFTC) states:

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be

205. Premerger Notification; Reporting and Waiting Period Requirements, 84 Fed. Reg. at 58,349.

206. Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2897, 2898 (proposed Jan. 17, 2020) (to be codified at 7 C.F.R. pt. 16); Schedules of Controlled Substances: Placement of cyclopentyl fentanyl, isobutyl fentanyl, para-chloroisobutyl fentanyl, para-methoxybutyl fentanyl, and valeryl fentanyl Into Schedule I, 85 Fed. Reg. 5356, 5356 (proposed Jan. 30, 2020) (to be codified at 21 C.F.R. pt. 1308).

207. Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs, 85 Fed. Reg. at 2898; Schedules of Controlled Substances, 85 Fed. Reg. at 5356.

208. Energy Conservation Program: Energy Conservation Standards for Consumer Refrigerators, 84 Fed. Reg. 62,470, 62,482 (proposed Nov. 15, 2019) (to be codified at 10 C.F.R. pt. 430); Content and Format of Substantial Equivalence Reports; Food and Drug Administration Actions on Substantial Equivalence Reports, 84 Fed. Reg. 12,740 (proposed Apr. 2, 2019) (to be codified at 21 C.F.R. pts. 16 & 1107); *see also Commenting on EPA Dockets*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/dockets/commenting-epa-dockets> [<https://perma.cc/AVN3-YWFM>] (including similar instructions on the website).

209. Energy Conservation Program, 84 Fed. Reg. at 62,482.

considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.²¹⁰

Note that this right of redaction acknowledges the problem of obscene language instead of protected information.

e. Notices of Opportunities to Challenge Decisions Regarding Disclosure or Withholding

As indicated in Table 2, five of the forty-three agencies examined (12%) include language in their NPRMs providing guidance to commenters of how to challenge agency decisions regarding disclosure or withholding of protected material. The best example is CFTC, which included language in a recent NPRM directing those wishing to submit protected information to do so in accordance with 17 C.F.R. § 145.9.²¹¹ Along with instructions about how to make such a submission, the cited regulation also lays out how such requests will be processed by the agency, beginning with an initial determination and the opportunity to appeal that initial determination to the General Counsel.²¹²

2. Public Meetings

Many agencies also encounter protected materials in public meetings. As noted above, six of the twenty-seven responses to the survey (22%) reported that they provide notice regarding the submission of PII or CBI in public meetings, although only four described how that guidance is provided. SEC has also published a SORN regarding comments submitted during Commission hearings.²¹³

One agency states that it “sometimes” provides notice by making a statement at the meeting. Another agency provides notice within the meeting materials. A third agency gives notice that the meeting is going to be broadcasted or recorded. Finally, two of the agencies stated that they rely on statements in the *Federal Register* notices that announce upcoming meetings to provide guidance on how information submitted at the meetings will be used. As one agency pointed out in an interview, most people at the meetings are aware the meetings are public and know not to share personal or sensitive information they want to keep private.

3. Websites

Notices and disclaimers provided in websites that accept rulemaking comments represent another important source of advance notice of policies governing the disclosure and withholding of CBI and PII in comments submitted in the public

210. Certain Swap Data Repository and Data Reporting Requirements, 84 Fed. Reg. 21,044, 21,044 (proposed May 13, 2019) (to be codified at 17 C.F.R. pts. 23, 43, 45 & 49).

211. *Id.*

212. 17 C.F.R. § 145.9(d)–(g) (2020).

213. Securities and Exchange Commission; Privacy Act of 1974, 41 Fed. Reg. 41,550, 41,562–63 (Sept. 22, 1976) (SEC-15).

rulemaking dockets. Regulations.gov lists twenty-nine of the forty-three agencies examined (67%) as participating agencies.²¹⁴ Of the fourteen members that are not participating agencies,²¹⁵ four members require paper submissions,²¹⁶ and the other ten members solicit and accept comments through their own websites.²¹⁷

a. Regulations.gov

Two-thirds of agencies examined accept comments in rulemaking proceedings through the Regulations.gov website.²¹⁸ A screenshot of the comment submission page for Regulations.gov appears in Figure 1. The process for submitting comments exposes prospective submitters to a number of notices and disclaimers.

214. The twenty-nine Administrative Conference member agencies who participate in Regulations.gov are CMS, CFPB, FTC, IRS, National Archives and Records Administration, NLRB, OSHA, OMB, OCC, SSA, USDA, DOC, DOD, ED, DOE, DHS, DOJ, DOL, DOS, Treasury, DOT, DVA, EPA, EEOC, FDA, GSA, NRC, OPM, and SBA. *Participating Agencies*, REGULATIONS.GOV, <https://www.regulations.gov/agencies> [<https://perma.cc/9PUA-7D4B>].


215. *Id.*

216. Simplified Proceedings, 75 Fed. Reg. 28,223, 28,223 (proposed May 20, 2010) (to be codified at 29 C.F.R. pt. 2700) (Federal Mine Safety and Health Review Commission); Practices and Procedures, 80 Fed. Reg. 66,787, 66,787 (proposed Oct. 30, 2015) (to be codified at 5 C.F.R. pt. 1201) (MSPB); Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission, 83 Fed. Reg. 48,578, 48,578 (proposed Sept. 26, 2018) (to be codified at 29 C.F.R. pt. 2200) (Occupational Safety and Health Review Commission); Post-Employment Conflict of Interest Restrictions; Departmental Component Designations, 85 Fed. Reg. 7252, 7252 (proposed Feb. 7, 2020) (to be codified at 5 C.F.R. pt. 2641) (OGE).

217. *See supra* Part II.A.3.

218. *See supra* note 214 and accompanying text. Note that the U.S. International Trade Commission (USITC) accepts submissions both through Regulations.gov and its own website. Submission and Consideration of Petitions for Duty Suspensions and Reductions, 84 Fed. Reg. 9273, 9273 (proposed Mar. 14, 2019) (to be codified at 19 C.F.R. pt. 220).

Figure 1: Comment Submission Page for Regulations.gov



SUPPORT

You are commenting on a Notice by the **Environmental Protection Agency**

Pesticide Product Registration; Receipt of Applications for New Uses February 2021.

Comment Period Ends: **Today**

Write a Comment

[Read Agency Guidelines](#) | [Commenter's Checklist](#)

Comment*

Start typing comment here...

X You can't leave this field blank

5000

Attach Files

You can attach up to 20 files, but each file cannot exceed 10MB. Valid file types include: bmp, docx, gif, jpg, jpeg, pdf, png, pptx, rtf, sgm, tif, tiff, txt, wpd, xlsx, xml.

Drop files here or

Browse...


Email Address

Email Address

☐ Opt to receive email confirmation of submission and tracking number? (We will never post on Regulations.gov or share your email with anyone else.)


Tell us about yourself! I am...*

(Select an identity below)




An Individual

If you or another single person is the author



An Organization

A company, organization, or government agency




Anonymous

If you do not want an entity associated with the comment

reCAPTCHA *

☐ I'm not a robot



! By submitting a comment, you agree to the terms of participation and privacy notice. Any personal information included in this submission may be publicly viewable on Regulations.gov and may be used to contact you for follow-up questions about your comment.

Submit Comment

Please see the Privacy Notice and User Notice regarding comment submission.

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy Notice and User Notice, the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.

Next to the entry of the relevant rule accepting comments will appear either a button stating, “Comment,” or a notice stating, “Comment instructions in document.” Those accessing the “Comment” function will be taken to a comment page with a disclaimer at the bottom:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy Notice and User Notice, the Federal Register notice on which you are commenting, and the Web site of the Department or Agency.²¹⁹

Clicking on the “Privacy Notice” presents prospective commenters with additional notice, including the following text:

The material you submit to a federal department or agency through Regulations.gov may be seen by various people. Any personally identifiable information (e.g., name, address, phone number) included in the comment form or in an attachment will be provided to the department or agency to which your comment is directed and may be publicly disclosed in a docket or on the Internet²²⁰

The User Notice contains the following notice on “Comments and Public Submissions”:

You should be aware that requirements for submitting comments may vary by department or agency. For purposes of submitting comments, some agencies may require that you include personal information, such as your name and email address, on the comment form. Each agency manages its own data within the site, according to agency-specific comment review and posting policy. Comments may be publicly disclosed in a docket or on the Internet (via Regulations.gov, a federal agency website, or a third-party, non-government website with access to publicly disclosed data on Regulations.gov).

Do not submit information whose disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information “CBI”) to Regulations.gov. Comments submitted through Regulations.gov cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. Some agencies may impose special requirements for submitting CBI or copyrighted works. To view any additional information or instructions for submissions, refer to the specific Federal Register notice on which you are commenting and the website of the department or agency.²²¹

219. *Comment Now!*, REGULATIONS.GOV, https://www.regulations.gov/comment?D=DOS_FRDOC_0001-5130 [<https://perma.cc/E39J-WPTG>].

220. *Privacy Notice*, REGULATIONS.GOV, <https://www.regulations.gov/privacy-notice> [<https://perma.cc/NAW6-6PMS>].

221. *User Notice*, REGULATIONS.GOV, <https://www.regulations.gov/user-notice> [<https://perma.cc/3BCB-LHE3>].

Regulations.gov itself does not provide uniform instructions regarding opportunities for confidential submission. However, a button for “Read Agency Guidelines” sometimes appears in the upper left region of each comment submission page that agencies are able to use to provide additional instructions regarding how to submit protected information. Before January 2021, an analogous button serving the same purpose was titled “Alternate Ways to Comment!”

Some agencies use this function to provide guidance regarding alternative methods for submitting comments containing CBI. For example, EPA uses a variety of language in its postings, but its most complete notice instructs commenters not to submit CBI or other information whose disclosure is restricted by statute; informs them that EPA’s policy is to include all comments not claimed to be CBI in the public docket without change, including any personal information provided, and to make them available via Regulations.gov; and directs parties interested in submitting CBI confidentially to consult with the agency via its website, email, or mail.²²²

The language that DOT has disclosed under “Alternative Ways to Comment” (a previous iteration of “Agency Guidelines”) reflects a somewhat different approach that covers both CBI and PII. For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA), a component agency of DOT, has provided guidance on “Confidential Business Information” instructing filers to “clearly designate the submitted comments as CBI” as appropriate and to submit redacted and unredacted copies along with an explanation why the material is CBI.²²³ It also informed filers unless notified otherwise, it “will treat such marked submissions as confidential under FOIA, and they will not be placed in the public docket of this document,” but failure to designate commentary as CBI will result in inclusion on the public docket.

FDA provided the most complete disclosure, providing a warning regarding both CBI and PII, including specific examples.²²⁴ The agency provides guidance on how to submit a comment containing protected materials that calls for a written/paper

222. *You are commenting on: The Environmental Protection Agency (EPA) Proposed Rule: National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of Operable Unit 1 of the Libby Asbestos Superfund Site*, REGULATIONS.GOV, <https://www.regulations.gov/comment?D=EPA-HQ-SFUND-2002-0008-0022> [<https://perma.cc/YU4Y-FLEN>] (follow “Alternative Ways to Comment” hyperlink).

223. *You are commenting on: The Pipeline and Hazardous Materials Safety Administration (PHMSA) Proposed Rule: Pipeline Safety: Valve Installation and Minimum Rupture Detection Standards*, REGULATIONS.GOV, <https://www.regulations.gov/comment?D=PHMSA-2013-0255-0005> [<https://perma.cc/UW95-M9CV>].

224. *You are commenting on: The Food and Drug Administration (FDA) Proposed Rule: Importation of Prescription Drugs*, REGULATION.GOV, <https://www.regulations.gov/comment?D=FDA-2019-N-5711-0001> [<https://perma.cc/6JXN-C2FW>] (follow “Alternative Ways to Comment” hyperlink) (“Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.”).

submission of redacted and unredacted copies, with the former containing a heading or cover note stating, “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.”²²⁵ FDA’s notice further directs filers to other relevant guidance: “Any information marked as ‘confidential’ will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf> [<https://perma.cc/C598-PW4J>].”²²⁶

The additional guidance is instructive. The regulation requires the deletion of “the names and other information that would identify patients or research subjects” before submission to FDA “in order to preclude a clearly unwarranted invasion of personal privacy.”²²⁷ But the regulations also provide that “[m]aterial prohibited from public disclosure under § 20.63 (clearly unwarranted invasion of personal privacy)” will not be made available to the public.²²⁸ Interestingly, the regulations specify that “[t]he office of the Division of Dockets Management does *not* make decisions regarding the confidentiality of submitted documents.”²²⁹

FDA’s *Federal Register* notice explains a change in policy permitting the public release of consumer comments.²³⁰ The volume of comments submitted since the 2007 merger of its docket system with Regulations.gov had undermined the feasibility of its previous policy, announced in 1995, of routinely reviewing all comments for obvious confidential information.²³¹ The shift away from the previous “precautionary” practice of nondisclosure presented no legal problems, “because, as FDA has stated previously, ‘there can be no reasonable expectation of confidentiality for information submitted to a public docket in a rulemaking proceeding.’”²³² Commenters are now “solely responsible for ensuring that the submitted comment does not include any confidential information that the commenter or a third party may not wish to be posted, such as private medical information, the commenter’s or anyone else’s Social Security number, or confidential business information, such as a manufacturing process” and that any name, contact information, or other identifying information included in the body of a submitted comment will be posted on Regulations.gov.²³³ The agency indicates its expectation that comments would need to include private, personal, or confidential information “only in exceptional instances” and directed commenters wishing to submit such information to do so in written/paper form, understanding that the redacted copy will be posted.²³⁴

225. *Id.*

226. *Id.*

227. 21 C.F.R. § 10.20(c)(4) (2020).

228. *Id.* § 10.20(j)(2)(i).

229. *Id.* § 10.20(c)(6) (emphasis added).

230. Consumer Comments—Public Posting and Availability of Comments Submitted to Food and Drug Administration Dockets, 80 Fed. Reg. 56,469, 56,469 (Sept. 18, 2015).

231. *Id.*

232. *Id.* (quoting Procedures for Handling Confidential Information in Rulemaking, 60 Fed. Reg. 66,981, 66,982 (Dec. 27, 1995)).

233. *Id.*

234. *Id.*

b. Other Websites

A number of agencies accept public comments through their own websites, either exclusively or along with Regulations.gov.²³⁵ Though some of these websites have limited notifications regarding the public nature of comments, some websites go above and beyond in providing notice, adopting novel strategies like pop-ups or “worksheet” style questions.

Some agencies require email addresses to comment. For example, the CFTC website requires an email address for submission of any online comment to avoid spam and Internet “bots,” though the email address is not published on CFTC.gov.²³⁶ Similarly, FERC requires registration to submit comments longer than 6,000 characters (eFiling) and an email address to leave a shorter comment (eComment).²³⁷

While CFTC affirmatively references the possibility of screening, redacting, or even removing comments from their online website if they are “inappropriate for publication,” the language in public comment notice references “obscene language” as opposed to the presence of CBI or PII as possible reasons for take-downs or redactions.²³⁸ Similarly, FERC only includes notice on its website that “comments containing profane, inflammatory, scurrilous, or threatening material will not be placed in public view.”²³⁹

Most of these agencies include notice on their websites regarding the public nature of submitted comments. CFTC explains:

All comments entered below will be published on www.cftc.gov without review and without removal of any personally identifying information or information that you or your business may wish to be held confidentially. Do not include social security numbers, your home address, or other personal information in your comment that you prefer not be made publicly available.²⁴⁰

The website does not, however, clearly reference any possible method of challenging withholding or disclosure decisions or any way to submit a confidential comment. FCC, on the other hand, while similarly noting on its own Electronic Comment Filing System (ECFS) that “all information submitted, including names and addresses, will be publicly available via the web,”²⁴¹ includes notice of a confidential disclosure method on the top of the page: paper filing.²⁴² Still, like CFTC, it does not include a

235. FERC, CFTC, FCC, FEC, FHFA, the Federal Reserve, the Postal Regulatory Commission, the Surface Transportation Board (STB), USITC, and SEC.

236. *Public Comments Form*, COMMODITIES FUTURES TRADING COMM’N, <https://comments.cftc.gov/PublicComments/CommentForm.aspx?id=3074>.

237. *Quick Comment*, FED. ENERGY REG. COMM’N, <https://ferconline.ferc.gov/QuickComment.aspx> [<https://perma.cc/W2SL-5RHH>]; *eFiling*, FED. ENERGY REG. COMM’N, <https://ferconline.ferc.gov/eFiling.aspx> [<https://perma.cc/QL43-9GNK>].

238. *Public Comments Form*, *supra* note 236.

239. *Quick Comment*, *supra* note 237.

240. *Public Comments Form*, *supra* note 236.

241. *Id.*; *ECFS Express*, FED. COMM’NS COMM’N, <https://www.fcc.gov/ecfs/filings/express> [<https://perma.cc/3R2Z-5H6X>].

242. *Non-Docketed Filing*, FED. COMM’NS COMM’N, <https://www.fcc.gov/ecfs/filings>

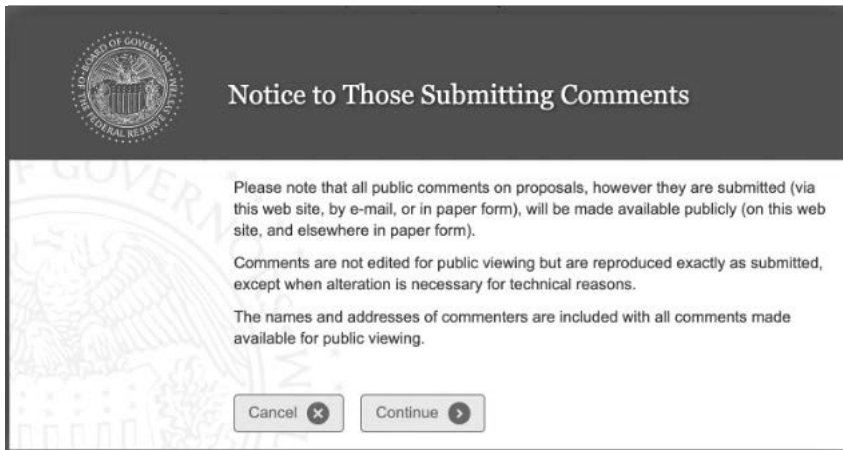
method of contesting decisions: the bottom of the comment submission page merely instructs anyone needing assistance to contact the ECFS help desk.²⁴³

Some agencies take an extra step to ensure that commenters read a privacy notice or do not submit CBI/PII. On the Board of Governors of the Federal Reserve System (Federal Reserve) submission web page, when a user navigates to the page to submit comments, a pop-up appears and informs the reader that:

[A]ll public comments on proposals, however they are submitted (via this website, by e-mail, or in paper form) will be made available publicly (on this web site and elsewhere in paper form). Comments are not edited for public viewing but are reproduced exactly as submitted, except when alteration is necessary for technical reasons. The names and addresses of commenters are included with all comments made available for public viewing.²⁴⁴

A screenshot of this pop-up notice appears in Figure 2.

Figure 2: Pop-Up Notice on Comment Submission Page for the Federal Reserve System



USITC, which accepts comments on both its website and on Regulations.gov,²⁴⁵ uses a scheme of questions to ensure that users are not accidentally submitting

/nodocket [<https://perma.cc/54TA-NVMM>] ("Documents containing information to be withheld from public inspection should be clearly and conspicuously labeled **"CONFIDENTIAL, NOT FOR PUBLIC INSPECTION."** This designation should be placed in the upper right-hand corner of each page. If these instructions are not followed, the filer increases the risk for inadvertent disclosure of confidential information.").

243. *Submit a Filing*, FED. COMM'NS COMM'N, <https://www.fcc.gov/ecfs/filings> [<https://perma.cc/6FEA-8W57>].

244. *Electronic Comment Form*, FED. RESERVE, https://www.federalreserve.gov/secure/forms/ElectronicCommentForm.aspx?doc_id=R%2D1669&doc_ver=1 [<https://perma.cc/4HPK-KP83>].

245. Submission and Consideration of Petitions for Duty Suspensions and Reductions, 84

confidential information publicly. When submitting a comment through EDIS, the first question asked beyond the contact information of the submitter is whether the comment “contains CBI or BPI,” as depicted in Figure 3.²⁴⁶ Next, it asks if the submitter’s comment is a “public version of a confidential document filed with the Commission.”²⁴⁷ Only after answering these questions are commenters able to complete their comments, though there is no other notice of the public nature of comments.²⁴⁸

Figure 3: Confidential Comment Submission for the U.S. International Trade Commission

c. Discussion

Regulations.gov provides useful disclosure of agency policies with respect to disclosure and withholding of CBI and PII. The ability to customize the language accessed through the link for “Alternate Ways to Comment” gives agencies the flexibility to adjust these notices to their different circumstances.

A few notes bear mentioning, however. Much of this information is click through—unless a submitter is affirmatively seeking an alternative way to comment, for example, they are unlikely to encounter any privacy notices or information about confidential submission. Further, because agencies may vary in their additional information, there are inconsistent notices regarding opportunities to submit protected information. Some of the pop-up notices available on other agency-maintained commenting websites, like the Federal Reserve, are more likely to be seen by commenters, though those notices still fail to contain information about other ways to comment.

Fed. Reg. 9273, 9273 (proposed Mar. 14, 2019) (to be codified at 19 C.F.R. pt. 220).

246. *Comments Submission*, INT’L TRADE COMM’N, <https://edis.usitc.gov/external/submission/submissionContainer.html> [<https://perma.cc/VL64-RFBU>].

247. *Id.*

248. *Id.*

Most importantly, however, the inconsistency regarding notice on both the public nature of submitted comments and availability of confidential submission processes may be confusing to commenters. All agencies are subjected to the same regulations regarding public disclosure, so the variation in the notice they provide to commenters is striking. In particular, not every agency provides specific notice that commenters are in fact *waiving* their privacy interests or their ability to claim something as CBI when they submit a public comment.

Some agencies also provide confidential submission processes (either via paper or online). This is likely to confuse some unexperienced, less savvy commenters. The requirement of paper submission is also inconsistent with the legal mandates to promote online participation in rulemaking to the greatest degree possible.

4. System of Records Notices (SORNs)

One interview participant and survey respondent suggested that the Systems of Records Notice (SORNs) required by the Privacy Act of 1974 provided commenters with sufficient notice and guidance about the relevant practices and procedures with respect to protected materials. To assess this possibility, we reviewed items published in the *Federal Register* to determine how many Administrative Conference member agencies have issued SORNs governing information submitted in public rulemaking dockets and examined what disclosures, if any, they contained regarding protected materials. The results are summarized in Table 3.

Table 3: System of Record Notices (SORNs) Filed by Agencies Examined
Applicable to Comments Submitted During Rulemaking Process

Type	Agencies
Systems for managing comments in public rulemaking dockets	10
Correspondence (including comments submitted to the agency)	1

Ten out of the forty-three agencies examined (23%) have published SORNs governing comments submitted in their public rulemaking dockets, as has the Pension Benefit Guaranty Corporation (PBGC).²⁴⁹ The U.S. Department of Homeland Security (DHS) has issued a SORN about correspondence that applies to “[i]ndividuals who submit inquiries, complaints, *comments*, or other correspondence to DHS,” which if read broadly could apply to comments submitted during a rulemaking proceeding.²⁵⁰

Interestingly, nine agencies who accept rulemaking comments through their own websites have not issued easily found SORNs to cover those records, including FEC, FERC, FHFA, Federal Reserve, USITC, PRC, SEC, and STB. The SEC’s website contains a link to a SORN for comments submitted during Commission hearings, but not for one submitted in response to NPRMs.²⁵¹

249. See *supra* Part II.A.4.I.
250. Privacy Act of 1974; System of Records, 83 Fed. Reg. 48,645, 48,645 (Sept. 26, 2018) (emphasis added).
251. Securities and Exchange Commission; Privacy Act of 1974, 41 Fed. Reg. 41,550,

a. Government-Wide SORN for the Federal Docket Management System (FDMS)

Up until 2019, the most important SORN was the government-wide SORN filed by EPA regarding the Federal Docket Management System (FDMS) designed to manage comments submitted via Regulations.gov.²⁵²

The FDMS SORN acknowledged that “[t]here will be instances when a person using FDMS to submit a comment or supporting materials on a Federal rulemaking must provide name and contact information (e-mail or mailing address) as required by an agency, or, a person may have the option to do so.”²⁵³ The SORN further noted that the FDMS necessarily contains information covered by the Privacy Act, including “personal identifying information (name and contact address/e-mail address).”²⁵⁴ The SORN explicitly acknowledged agency discretion to withhold or revise comments:

Each agency has the opportunity to review the data it receives as part of its rulemakings. An agency may choose to keep certain types of information contained in a comment submission from being posted publicly, while preserving the entire document to be reviewed and considered as part of the rulemaking docket. . . . Each agency manages, accesses, and controls the information in the FDMS that is submitted to that particular agency and also maintains the sole ability to disclose the data submitted to that particular agency.²⁵⁵

The FDMS SORN contained boilerplate language not specific to the rulemaking context directing individuals seeking amendment or correction of a record to submit that request to the agency contact indicated on the initial document for which the related contested record was submitted.²⁵⁶ In rulemaking context, this would generally entail the agency contact listed within the *Federal Register* NPRM.

In 2019, the General Services Administration (GSA) took over as the managing partner of the e-Rulemaking Program, including the Federal Docket Management System and Regulations.gov. While the GSA has filed a SORN related to its new management, the SORN is only for “partner agencies’ users’ names, government issued email addresses, telephone numbers, and passwords as credentials. In addition, users provide their supervisor’s name, telephone number, and government issued email address.”²⁵⁷ The SORN does not cover any records “pertaining to

41,562–63 (Sept. 22, 1976) (SEC-15).

252. Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. 15,086, 15,086 (Mar. 24, 2005), *amended by* Amendment of the Federal Docket Management System (EPA/GOV-2), 78 Fed. Reg. 60,868 (Oct. 2, 2013). Note that the U.S. General Services Administration (GSA) took over as managing partner of the FDMS. Privacy Act of 1974; Systems of Records, 84 Fed. Reg. 53,728, 53,728 (Oct. 8, 2019).

253. Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. at 15,086.

254. *Id.*

255. *Id.*

256. *Id.* at 15,088.

257. Privacy Act of 1974; System of Records, 84 Fed. Reg. 53,728, 53,729 (Oct. 8, 2019).

agency rulemakings.”²⁵⁸ Given this transition, it is currently unclear if there is an agency-wide SORN that covers records pertaining to agency rulemakings received on the FDMS and Regulations.gov.

b. Other SORNs

Beyond the government-wide SORN, many agencies have agency specific SORNs to cover other systems of records they maintain. Though much of the language used in these SORNs tracks similarly to the original EPA government-wide SORN explored above, some agencies are more specific regarding how the agency uses and retains personal information.

The Commodities Futures Trading Commission (CFTC) recently modified CFTC-45, its SORN that covers comments received online.²⁵⁹ Regarding the privacy of information submitted by commenters, both online and otherwise, CFTC explained:

The commenter’s contact information, or other additional personal information voluntarily submitted, is not published on the internet, *unless the commenter has incorporated such information into the text of his or her comment*. During an informal rulemaking or other statutory or regulatory notice and comment process, Commission personnel may manually remove a comment from publication if the commenter withdraws his or her comments before the comment period has closed or because the comment contains obscenities or other material deemed inappropriate for publication by the Commission. However, comments that are removed from publication will be retained by the Commission for consideration as required by the APA, or as part of the Commission’s documentation of a comment withdrawal in the event that one is requested.²⁶⁰

When detailing the types of information included within the system, CFTC emphasizes that they sometimes receive personal information: “The comments or input provided may contain other personal information, although the comment submission instructions advise commenters not to include additional personal or confidential information.”²⁶¹ CFTC’s SORN also includes information concerning the protection of records from unauthorized access, including agency-wide

258. *Id.* at 53,728.

259. Privacy Act of 1974; System of Records, 84 Fed. Reg. 17,816 (Apr. 26, 2019).

260. *Id.* at 17,817 (emphasis added).

261. *Id.* at 17,817–18; *see also* Privacy Act of 1974; Systems of Records, 82 Fed. Reg. 35,872, 35,873 (Aug. 1, 2017) (DVA noting that that “personal information” about the commenter may be included in the FDMS); Privacy Act of 1974; System of Records, 85 Fed. Reg. 1198, 1199 (Jan. 9, 2020) (“[C]omments or input submitted to Treasury may include the full name of the submitter, an email address and the name of the organization, if an organization is submitting the comments. The commenter may optionally provide job title, mailing address and phone numbers. The comments or input provided may contain other personal information, although the comment submission instructions advise commenters not to include additional personal or confidential information.”).

procedures regarding protecting PII and annual privacy and security trainings.²⁶² However, those procedures are not explained in any detail.

PBGC goes into more detail regarding the *types* of information retained on its comment soliciting websites.²⁶³ PBGC notes that the information in the record “may include name, email address, physical address, phone numbers, PBGC customer identification numbers, Social Security numbers, dates of birth, dates of hire, dates of termination, marital status, [and] pay status.”²⁶⁴ The SORN also clarifies that “information, including PII, contained in comments about agency rulemaking, whether submitted through *pbgc.gov* or *regulations.gov*, may be published to the PBGC website.”²⁶⁵

Some agencies, like the Department of Defense, explicitly note in their SORN that only individual commenters who voluntarily provide their personal contact information when commenting are covered by the SORN, because anonymous commenters cannot be identified.²⁶⁶

If an individual has voluntarily furnished his or her name when submitting the comment, the individual, as well as the public, can view and download the comment by searching on the name of the individual. If the comment is submitted electronically using the FDMS system, the viewed comment will not include the name of the submitter or any other identifying information about the individual except that which the submitter has opted to include as part of his or her general comments.²⁶⁷

DOJ similarly states in its SORN regarding the Justice Federal Docket Management System that anyone who “*provides* personally identifiable information pertaining to DOJ and persons mentioned or identified in the body of a comment” is subject to the SORN.²⁶⁸ The SORN confirms that the names, identifying information, and full text of all comments will be available for public viewing, but that “[c]ontact information (e-mail or mailing address) will not be available for public viewing, unless the submitter includes that information in the body of the comment.”²⁶⁹

Some agencies mention the possibility of redaction. DOJ’s SORN notes that a component of DOJ “may choose not to post certain types of information contained in the comment submission, yet preserve the entire comment to be reviewed and considered as part of the rulemaking docket.”²⁷⁰ In particular, the SORN cites “material restricted from disclosure by Federal statute” as the type of information that would be withheld.²⁷¹ The U.S. Department of the Treasury’s (Treasury) SORN similarly references redaction:²⁷²

262. Privacy Act of 1974; System of Records, 84 Fed. Reg. 17,816, 17,818 (Apr. 26, 2019).

263. See Privacy Act of 1974; System of Records, 82 Fed. Reg. 6247, 6274 (Feb. 13, 2018).

264. *Id.* at 6275.

265. *Id.*

266. Privacy Act of 1974; System of Records, 71 Fed. Reg. 586, 586 (Jan. 5, 2006).

267. *Id.*

268. Privacy Act of 1974; System of Records, 72 Fed. Reg. 12,196, 12,197 (Mar. 15, 2007) (emphasis added).

269. *Id.* at 12,196.

270. *Id.*

271. *Id.*

272. Privacy Act of 1974; System of Records, 85 Fed. Reg. 1194, 1198 (Jan. 9, 2020).

During an informal rulemaking or other statutory or regulatory notice and comment process, Department personnel may manually remove a comment from posting if the commenter withdraws his or her comments before the comment period has closed or because the comment contains obscenities or other material deemed inappropriate for publication by the Treasury. However, comments that are removed from posting will be retained by the Department for consideration, if appropriate under the APA.²⁷³

Only DOJ is clear regarding its contesting procedure: individuals who seek to contest or amend the information “should direct their requests to the appropriate system manager at the address indicated in the System Managers and Addresses section . . . stating clearly and concisely what information is being contested, the reason for contesting it, and the proposed amendment to the information sought.”²⁷⁴ The Systems Managers list included separate managers for policy issues and technical issues.²⁷⁵

Agencies using the Federal Docket Management System sometimes use seemingly boilerplate language—the U.S. Department of Labor’s (DOL) SORN has the same privacy notice as DOD regarding the public nature of all comments received on the Federal Docket Management System and confirming that a comment is searchable by the submitter’s name.²⁷⁶ The language of the two agencies’ SORNs is virtually indistinguishable.

DVA is the only agency explicit about its *use* of records and information collected during the rulemaking process.²⁷⁷ Not only is this information collected by DVA to identify commenters, as it notes, but it is also used to allow “clarification of the comment, direct response to a comment, and other activities associated with the rulemaking or notice process.”²⁷⁸

c. Discussion

There is no doubt that regarding a few areas, SORNs provide some degree of notice to the public about agency policies with respect to protected information. In particular, most SORNs emphasize that if a name is provided by the commenter, his or her comment will be publicly searchable online. This information is important, because while website disclaimers and NPRMs mention the public availability of comments, no other notice but the SORNs explicitly detail the fact that comments will be searchable by and associated with the commenter’s name, regardless of what language is included in the comment. Additionally, a few SORNs, including that of Treasury, explain that even comments removed from the public rulemaking record

273. *Id.*

274. System of Records, 72 Fed. Reg. at 12,198.

275. *Id.*

276. Privacy Act of 1974; System of Records, 84 Fed. Reg. 57,484 (Oct. 25, 2019). For DOD’s SORN, see Privacy Act of 1974; System of Records, 71 Fed. Reg. 586 (Jan. 5, 2006).

277. Privacy Act of 1974; Systems of Records, 82 Fed. Reg. 35,872, 35,873 (Aug. 1, 2017).

278. *Id.*

will be included in the required rulemaking docket submitted for judicial review under the APA.

At the same time, SORNs lack important information regarding public disclosure of comments. Because SORNs are only required for systems of records that are searchable by name or other personal identifiers, they generally focus only on comments where a submitter has voluntarily provided their own contact information—not where a submitter may have attempted to comment anonymously but inadvertently revealed important details about themselves in the body of the comment.

In addition, SORNs are not easy to find. Unlike the NPRMs, which most commenters likely to consult before leaving a comment, SORNs are often included on one isolated page of an agency's website (which contain lists that are sometimes incomplete and hard to reference) and published infrequently in the *Federal Register* when updates are necessary. The fact that agencies have their own classification methods regarding systems of records adds to the confusion. While the agencies mentioned above explicitly refer to electronic rulemaking and comments in their SORNs, other agencies may rely on general correspondence SORNs to cover this category of records. Commenters are less likely to encounter SORNs than they are to encounter NPRMs or web page notices.

5. Surveys, Negotiated Rulemakings, Ex Parte Communications, and Regulations

The survey conducted by our research team also identified a number of other methods that agencies use to communicate their policies with respect to disclosing and withholding protected information. Four agencies reported giving advance guidance regarding their policies with respect to protected materials when administering surveys. Two agencies provided the detail that they included that notice within the survey instrument itself.

Two agencies reported that they provide advance notice regarding their policies of submitting CBI and PII before information is submitted during a negotiated rulemaking, although neither agency provided any detail about their specific practices. One interview subject similarly reported giving such disclosures, but was surprised by how much proprietary information participants disclosed.

Two other agencies reported that they provide advance guidance as to their policies regarding the disclosure of protected materials in ex parte communications, but neither agency chose to elaborate on the precise nature of that advanced guidance.

One survey response also cited general reliance on its publicly available agency regulations on disclosure as advance guidance and notice to parties potentially submitting information. Similar references occur in NPRM language issued by FTC²⁷⁹ and CFTC²⁸⁰ and in language provided by FDA in the “Alternative Ways to Comment” link in Regulations.gov.²⁸¹

Still another agency reported including an additional statement regarding the submission of information on the page of its website where it provides a link to

279. See *supra* note 203–05 and accompanying text.

280. See *supra* notes 209–10 and accompanying text.

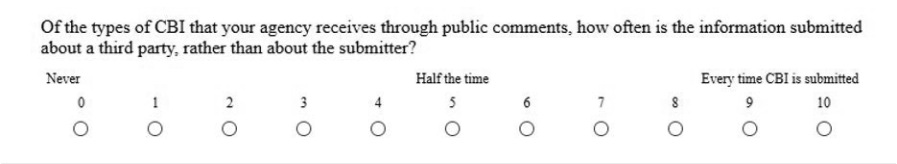
281. See *supra* notes 225–27, 229 and accompanying text.

Regulations.gov. As noted above, FCC also provides guidance on other portions of its website.²⁸² NPRMs issued by EPA similarly point to guidance on its website.²⁸³

B. Type and Frequency of Submission of Protected Materials

Another section of the survey sent to agencies was designed to measure the types of protected materials they received and with what frequency. Agencies were asked separately about CBI and PII. They were also asked how often they encounter protected materials about third parties on a scale from 0 to 10, as shown in Figure 4.

Figure 4: Protected Materials about Third Parties



The caption above this scale characterizes 0 as “never” and 10 as “Every time CBI is submitted.” The natural way to read this scale is to interpret a response of 0 as 0% of the time and to interpret a response of 10 as 100% of the time, with each number in between corresponding to a 10% increase in frequency.

1. Confidential Business Information (CBI)

The first portion of the survey asked agencies what types of CBI they encountered over the course of rulemaking. The survey responses are summarized in Table 4:

Table 4: Types of CBI Encountered in Rulemaking Proceedings

Type	Responses
Total affirmative responses	13
Trade secrets	7
Financial regulatory information	6
Other	8

Thirteen of the twenty-seven survey responses (48%) and eleven of the twenty-three agencies responding to the survey (4%) indicated that they sometimes receive CBI in rulemaking proceedings. Three interview subjects indicated that CBI can interfere with the ability to justify rules, as the obligation not to disclose that information to the public effectively forecloses the agency from relying on it as the basis for its action. One agency noted that commenters request CBI status only a

282. See *supra* notes 239–41 and accompanying text.
283. Air Plan Approval; FL; 2010 1-Hour SO2 NAAQS Transport Infrastructure, 85 Fed. Reg. 7480, 7491 (proposed Feb 10, 2020) (to be codified at 40 C.F.R. pt. 52).

handful of times a year. Another agency reported that the increasing competitiveness of the business environment has caused requests for confidentiality to increase.

Of the thirteen agencies that reported encountering some type of CBI during rulemaking proceedings, seven agencies reported that they encountered trade secrets (26% of all submissions, 54% of submissions reporting encountering CBI); six agencies reported that they encountered financial regulatory information, such as Form 8-Ks and 10-Ks (22% of all submissions, 46% of submissions reporting encountering CBI); and eight agencies reported that they received “Other kinds of CBI” (30% of all submissions, 62% of submissions reporting encountering CBI). Agencies reported encountering the following five types of CBI as falling within this catchall category, with the frequency indicated in parentheses:

- Strategic documents (2).
- Personal bank account and financial information, including bank statements (2).
- Pricing, cost, operational and revenue data and methodologies (1).
- Marketing and sales information (1).
- Financial data that does not satisfy the legal definition of a “trade secret” (1).

One of the agencies indicating that it received strategic documents described them as including competitive strategy and market share.

The survey also asked agencies how often they encountered CBI about a third party. The results are reported in Table 5.

Table 5: Frequency with Which Agencies Encounter CBI About Third Parties in Rulemaking Proceedings

Frequency	Responses
Never	8
10% of the time	3
20% of the time	2

When asked how often this information was about a third party, eight of the thirteen respondents who reported encountering CBI replied that they never receive CBI about a third party (30% of all submissions, 62% of submissions reporting encountering CBI). Three agencies rated the frequency of receiving CBI from a third party as a 1 on a scale of 1 to 10 (11% of all submissions, 23% of submissions reporting encountering CBI), and two agencies reported it as a 2 (7% of all submissions, 15% of submissions reporting encountering CBI). If these data points are combined to form a weighted average, the survey responses suggest that the average agency encounters CBI about third parties roughly 5% of the time. As explored below, agencies report that they encounter CBI about third parties much less frequently than PII about third parties.

2. Personally Identifiable Information (PII)

Agencies were asked what types of PII they encounter during rulemaking proceedings. The survey responses are summarized in Table 6:

Table 6: Types of PII Encountered in Rulemaking Proceedings

Type	Responses
Total affirmative responses	17
Social Security numbers	8
Medical information	7
Other	15

Seventeen of the twenty-seven survey submissions (63%) and sixteen of the twenty-three agencies responding to the survey (69%) indicated that they receive some type of PII in rulemaking proceedings. Of the seventeen agencies that reported encountering some type of PII during rulemaking proceedings, eight agencies reported encountering Social Security numbers (35% of all submissions, 47% of submissions reporting encountering PII); seven agencies reported encountering medical information during rulemaking (30% of all submissions, 41% of submissions reporting encountering PII); and fourteen agencies reported that they received “Other kinds of PII” (61% of all submissions, 82% of submissions reporting encountering PII). Agencies reported encountering the following six types of PII as falling within this catchall category, with the frequency indicated in parentheses:

- Contact information (including names, home addresses, phone numbers, and email addresses) (10).
- Dates of birth (4).
- Employment/salary information (2).
- Marital status (1).
- Information about dependents (1).
- Alien registration number (1).
- Photocopies of passports, bank statements, and drivers’ licenses (1).
- Information about security clearances (1).

The survey also asked agencies who reported receiving PII how often they encountered PII about a third party. The results are reported in Table 7.

Table 7: Frequency with which Agencies Encounter PII About Third Parties in Rulemaking Proceedings

Frequency	Responses
Never	6
10% of the time	2
20% of the time	4
30% of the time	1
40% of the time	1
90% of the time	3

Six of the seventeen respondents (35%) and sixteen agencies who responded to this question stated that they never receive PII about a third party. Two agencies (12%) rated the frequency of receiving PII from a third party as a 1 on a scale of 1 to 10; four agencies (24%) rated it as a 2; one agency (6%) rated it at a 3; one agency (6%) rated it as a 4; and three agencies (17%) rated it as a 9. If these responses are

combined to form a weighted average, the survey responses suggest that the average agency encounters PII about a third party 16% of the time.

The type of PII that agencies encounter clearly depends on the subject matter under their jurisdiction. For example, one agency with jurisdiction over a subject matter that does not routinely implicate personal matters reported that it did not recall ever receiving PII about a third party, while agencies whose authority directly covers subject matter that almost always involves PII report much higher frequencies.

The survey responses suggest that information about third parties is submitted far more frequently for PII than CBI. Agencies generally recognized that screening for certain types of PII, such as Social Security numbers, is relatively straightforward. Two agencies expressed concern about the ability to screen for other types of third-party information.

C. Agency Processes for Dealing with Protected Materials

A number of survey and interview questions were designed to learn more about agencies' processes for dealing with protected materials. Prominent issues included the frequency and standards used for screening for CBI and PII, procedures for reviewing requests for confidentiality, techniques of facilitating meaningful review of protected materials, and procedures for challenging decisions regarding protected materials.

1. Frequency of Screening for CBI and PII

The survey asked respondents whether their agency screened information submitted for CBI and PII. The results are summarized in Table 8.

Table 8: Whether Agency Screens for CBI and PII

Type	Responses
Yes	13
No	5

Of the eighteen responses representing seventeen agencies that answered the question, thirteen reported that they screen some submissions for CBI and PII (72%), while five indicated that they do not (28%). Two survey responses affirmatively indicated that they conduct no screening of public comments in the absence of a confidentiality request. One of the responses who indicated that they screened for CBI/PII clarified that they did not screen public comments, only other types of submitted information.

The survey also asked what methods these agencies used to screen comments for CBI and PII. The results are summarized in Table 9.

Table 9: Methods for Screening for CBI and PII

Type	Responses
Total affirmative responses	9
Agency employees	8
Independent contractor	4
Artificial intelligence	1
Other	0

Eight of the nine agencies (89%) who answered questions about who performed the screening reported using agency staff to screen dockets. Four agencies reported using contractors (44%). Only one agency reported relying on using artificial intelligence (AI) to screen (11%). One agency reported that “most” agencies have docket scanners, either contractors or staff, who screen for PII and then exclude it from the docket. One agency reported that the secretary’s office or the web group performs screening for the agency instead of the rulemaking staff.

Agencies have reported changes in their screening methods over time. For example, one agency described feeling “disconnected” from the commenting process when contractors managed the docket and switched back to using agency staff to obtain a better feel for the timing and the substance of the comments. Another agency reported that they are currently considering using AI to screen for confidential and personal information along with abusive comments.

The survey also asked how frequently agencies excluded comments containing CBI and PII from their public rulemaking dockets. The results are summarized in Table 10.

Table 10: Frequency with Which Agencies Exclude PII or CBI from Public Rulemaking Dockets

Frequency	Responses
Never	3
10% of the time	7
20% of the time	3
50% of the time	2
70% of the time	1
90% of the time	1

Three of the seventeen survey respondents (18%) reported that they never receive PII or CBI from a public rulemaking docket. Seven respondents (41%) reported making such exclusions 10% of the time. Two respondents (12%) reported making such exclusions 20% of the time, while another two respondents (12%) reported doing so 50% of the time. Finally, one survey respondent (6%) reported making such exclusions 70% of the time, while another respondent (6%) reported doing so 90% of the time. If these responses are combined to form a weighted average, the survey responses suggest that the average agency excludes PII or CBI 23% of the time. The skewness of the distribution suggests that certain agencies make such exclusions much more frequently than others.

Because Regulations.gov and other websites allow electronic filing, however, some agencies expressed concerns that requiring screening or scrubbing of every comment for CBI or PII would “paralyze” the system by focusing all agency resources towards screening comments and slowing down rulemaking. As explored below, this worry of additional burden permeated most conversations we had with agencies.

2. Standards for Screening for CBI and PII

Regarding the substance of screening criteria, one interview subject indicated that it has no written policy. Most agencies reported giving screeners some level of guidance as to how to screen for CBI and PII. The guidance varied in its level of specificity. Five agencies reported specifically instructing screeners to redact information such as Social Security numbers, dates of birth, driver’s license and other similar identification numbers, passport numbers, financial account numbers, and credit/debit card numbers. Two agencies advise staff to redact addresses and phone numbers. One agency reports advising staff to redact medical records. One agency advises staff screening for CBI to look for copyrighted materials, trade information, and commercial and financial information.

Up until 2015, FDA did not publicly post comments submitted by individuals in their individual capacity on Regulations.gov—only comments of those representing organizations, corporations, or other entities.²⁸⁴ When FDA changed this long-standing practice in 2015, it cited “transparency and public utility of FDA’s public dockets” as the major reason for the change.²⁸⁵

But FDA provided another important notice when announcing this change. It explained that the process of routinely reviewing all comments for “obvious confidential information” is “no longer feasible given the volume of comments FDA receives and the adoption of a government-wide electronic portal system for submitting and posting comments.”²⁸⁶ FDA’s initial reason for withholding individual comments was based largely on the concern of inadvertent personal disclosure by commenters.²⁸⁷ In light of this new policy, FDA explains:

The commenter is solely responsible for ensuring that the submitted comment does not include any confidential information that the commenter or a third party may not wish to be posted, such as private medical information, the commenter’s or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. If a name, contact information, or other information that identifies the commenter is included in the body of the submitted comment, that information will be posted on <http://www.regulations.gov>. FDA will post comments, as well as any attachments submitted electronically, on <http://www.regulations.gov>,

284. Consumer Comments—Public Posting and Availability of Comments Submitted to Food and Drug Administration Dockets, 80 Fed. Reg. 56,469, 56,469 (Sept. 18, 2015).

285. *Id.*

286. *Id.*

287. *Id.*

along with the State/Province and country (if provided), the name of the commenter's representative (if any), and the category selected to identify the commenter (e.g., individual, consumer, academic, industry).²⁸⁸

FDA also describes a confidential submission process, the details of which will be published in the NPRMs appearing in the *Federal Register*:

The Agency expects that only in exceptional instances would a comment need to include private, personal, or confidential information. If a comment is submitted with confidential information that the commenter does not wish to be made available to the public, the comment would be submitted as a written/paper submission and in the manner detailed in the applicable Federal Register document. For written/paper comments submitted containing confidential information, FDA will post the redacted/blacked out version of the comment including any attachments submitted by the commenter. The unredacted copy will not be posted, assuming the commenter follows the instructions in the applicable Federal Register document. Any information marked as confidential will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law.²⁸⁹

The screening processes employed by other agencies tend to be rather informal. Four agencies described a brief screening process for CBI and PII that did not appear to follow any specific set of guidelines. Those agencies were merely on the lookout for "sensitive" or "confidential" information. Another agency reported that while they have no written policy regarding what to do when confronted with a comment containing potentially sensitive information, they generally tend to block out Social Security numbers for Regulations.gov. One agency explained that when encountering third-party information, a staffer's immediate first action would be to designate the comment as "do not post" and start a process of evaluation with FOIA counsel. A lack of "resources," as one agency explained, has also led at times to very infrequent application of certain informal policies: 100,000 comments are much less likely to get scrutinized for sensitive information, for example, than ten comments. A few interview subjects also noted that though they may screen comments on Regulations.gov, they may still include that information in some form on the administrative record.

Only one survey respondent reported offering formal training for screening staff. That agency reported conducting mandatory privacy training annually for all agency staff and additional individual training for all docket staff on how to recognize and redact PII. That agency further provided agency experts and attorneys who could work with docket screening staff to consult on CBI and PII issues. The SORN for CFTC also specifically requires annual privacy and security training.²⁹⁰

Regarding the need for such guidance, agency views were mixed. On the one hand, one interview subject expressed concern about individual agency staff basing decisions regarding redaction on their own conception of what should be private.

288. *Id.* at 56,469–70.

289. *Id.* at 56,470.

290. *See supra* note 260 and accompanying text.

Another interview subject expressed support for the idea of giving agency staff guidance as to what information should be withheld. On the other hand, a third interview subject reported that his agency does not see the need for more policies.

3. Procedures for Reviewing Requests for Confidentiality

As noted earlier, our review of the NPRMs employed by agencies disclosed that eight of the forty-three agencies' NPRMs (19%) disclosed to commenters the opportunity to request treating portions of their comments as confidential.²⁹¹ Two of the twenty-seven survey responses (7%) indicated the same.

In some cases, agency regulations reveal how those requests are handled. FTC's NPRM notes FTC Rule 4.9 gives the authority to decide whether to grant a request for confidential treatment up to the General Counsel.²⁹² Rule 4.9(c) specifies that "[t]he General Counsel or the General Counsel's designee will act upon such request with due regard for legal constraints and the public interest" and that no material contained in such a request "will be placed on the public record until the General Counsel or the General Counsel's designee has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law."²⁹³

As noted earlier, the NPRMs issued by CFTC point to agency rules that describe a slightly more extensive process for handling requests for confidential treatment.²⁹⁴ The rules assign the responsibility for making the initial determination to the Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance or his or her designee.²⁹⁵ The Assistant Secretary or his or her designees must inform commenters who have their request for confidential treatment denied in whole or in part of their right to appeal that decision to the CFTC General Counsel.²⁹⁶ Any such appeal must be made in writing and must be decided within twenty days.²⁹⁷ The General Counsel may refer appeals to the full Commission.²⁹⁸

Some interview subjects offered that these systems can be abused and that agencies often find themselves in situations where they are pushing back against overinclusive confidentiality requests from businesses. As a few agencies expressed in interviews, oftentimes businesses handing over information request confidentiality to the point where it is "impossible" to go through the documents and information page by page to decide what is confidential. Some companies have begun requesting confidentiality for almost everything they file, even in situations where much of the information being submitted is not "competitively sensitive." Another agency noted that many items "marked as confidential business information" by the submitter come from law firms.

Interview subjects report that agency staff who want to rely on certain information in writing an order can struggle when that information is confidential. Dissatisfied

291. *See supra* Part II.A.1.c.

292. *See supra* note 203 and accompanying text.

293. 16 C.F.R. § 4.9(c)(1) (2020).

294. *See supra* note 210 and accompanying text.

295. 17 C.F.R. § 145.9(f)(1) (2020).

296. *Id.* § 145.9(f)(2).

297. *Id.* § 145.9(g)(1), (7).

298. *Id.* § 145.9(g)(3).

with the admonition, “[t]rust us based on an appendix we included that you cannot see,” members of the public often push back through FOIA requests and other litigation. Because of this, one agency actually explained that it seeks to dampen or eliminate confidential comments, if possible. The more public information, after all, makes for easy rule-writing decisions.

One agency noted that assertions of confidentiality are growing more frequent and described the lengthy process it must undergo to challenge an assertion of confidentiality: when a party requests confidential treatment, it is treated as such until the agency rules otherwise. If the agency does rule otherwise, the party has another ten business days to seek review by the full commission, and then ultimately has ten days to seek a stay in court. Only after that whole process has run its course is the purported confidential information made public. While this agency is sensitive to the fact that once CBI is made public, it is public forever, it notes how “cumbersome” and at times “paralyzing” the process can be.

4. Techniques for Facilitating Meaningful Public Comment on Protected Materials

Agencies that withhold protected materials must confront another a problem: how do they report enough information to explain their rulemaking processes while still protecting commenters’ privacy? The survey specifically asked agencies what techniques they used to facilitate meaningful public comment regarding CBI and PII that have been withheld. The results are summarized in Table 11.

Table 11: Techniques for Facilitating Meaningful Public Comment Regarding CBI and PII That Have Been Withheld

Type	Responses
Total affirmative responses	11
Redaction	8
Aggregation	6
Anonymization	5
Other	2

Of the eleven responses to this question, eight agencies (73%) indicated that they used redaction. Six agencies (55%) said that they employed aggregation. Five agencies (45%) relied on anonymization. Two agencies (18%) used other means: specifically redacting only the name and address and contacting the submitter to request withdrawal of the comment.

The survey indicates that redaction is the most common technique that agencies use to balance their obligation to disclose as much information as possible against their duty to protect certain types of information. But redaction can present problems: as one agency explains, there are some types of information where other facts can be inferred if the public is given pieces.²⁹⁹ Another agency explains that it uses redaction to protect information in comments, but if a court had an issue with a redacted comment, it would seek a protective order. According to that agency, no court has

299. This mirrors the analysis under FOIA Exemption 4.

ever had an issue with a redacted comment so long as it was able to review the unredacted document *in camera*.

The second most common technique is aggregation. As explained by one agency, aggregation can be used to protect information from disclosure to the government as well as to the public. This agency retains outside private consultants operating under nondisclosure agreements to gather information from a variety of companies and use the aggregated data to create a spreadsheet that is submitted to the government. By virtue of this aggregation process, no other information can be disclosed to the public even after a FOIA request. Aggregation is not limited to data, either. Another agency explained that it will not always post every comment or the exact language of every comment when explaining a Final Rule, but will explain that it received a certain number of comments with the same general message. This is especially common in group filings, where a large number of people will all submit one comment together.

Five agencies use anonymization, such as reporting comments without indicating who left the comment. Note that Regulations.gov, which a vast majority of agencies use to collect comments, does not require commenters to submit a name. SEC and FCC comment websites, on the other hand, do require names. These websites, however, do permit submission of pseudonymous comments or comments under the name “Anonymous,” although it is unclear the extent to which these agencies review these comments.

Interviews with agency officials revealed still other techniques. One agency includes smaller parts of confidential information in a public docket or notice of a final rule so that they can include it in their analysis. Another agency files some aspects of the record under seal. In that situation, the sealed information can be disclosed as part of the record without the agency having to say exactly what it was. Still, in these cases, there is still undisclosed information that the public cannot see.

5. Procedures for Challenging Decisions to Disclose or Withhold Protected Materials

The survey asked respondents whether their agency has a review process for challenging decisions regarding the disclosure or withholding of CBI or PII from its public rulemaking docket. The results are summarized in Table 12.

Table 12: Whether the Agency Has a Review Process for Challenging Decisions Regarding the Disclosure or Withholding of CBI or PII from Its Public Rulemaking Docket

Type	Responses
Process for Challenging Disclosure	6
Process for Challenging Withholding	4

Six of the seven agencies that responded to this question (86%) indicated that they had a process for challenging decisions regarding disclosure, while four agencies (57%) indicated that they had a process for challenging decisions regarding withholding. A closer look at these survey responses reveals that three agencies have a set process to challenge disclosure, one agency has a set process for challenging withholding, and three agencies have set processes for both.

Of the four agencies with processes to challenge withholding, two generally rely on the FOIA request and appeal process, one applies a similar process that allows challenges of withholding decisions via motion, and one agency has a specific codified process that relies, in part, on FOIA interpretations.

Of the six agencies that have set processes for challenges regarding the decision to disclose, one agency allows requests to remove comments from the docket. Ombudsmen are often available at agencies to help with general complaints, and agency interviews indicated that contacting the Ombudsman would be a proper avenue to request that PII contained in a comment to be taken down. One agency allows commenters to comment and request that his or her PII be displayed, if it was redacted.

The survey also included questions about how frequently these types of challenges are brought. The results are summarized in Table 13.

Table 13: Frequency with Which Commenters Challenge Decisions Regarding Disclosure and Withholding of CBI or PII

Frequency	Disclosure	Withholding
Never	12	12
10% of the time	2	2
20% of the time	1	1

Twelve of the fifteen agencies that responded to this question (80%) indicated that challenges to decisions about both disclosure and withholding never occur. Two of the fifteen agencies (13%) reported that challenges to decisions about both disclosure and withholding occur 10% of the time. One of the fifteen agencies (7%) reported that challenges to decisions about both disclosure and withholding occur 20% of the time, with those challenges focusing on CBI, not PII. If these data points are combined to form a weighted average, the survey responses suggest that the average agency faces challenges to disclosure and withholding with about the same frequency and that each occurs roughly 3% of the time.

A major thread throughout our interviews was the ability of agencies to both facilitate meaningful public comment and explain their regulations made partially on CBI or PII. But when information is withheld, it can pose problems for agencies attempting to satisfactorily justify their decisions under a 5 U.S.C. § 553(c) general statement or when undergoing arbitrary and capricious review under 5 U.S.C. § 706(a). As one agency put it when interviewed, when some data is classified, what should it do if it has information justifying a regulatory decision that it cannot make public?

III. FINDINGS AND RECOMMENDATIONS

The legal analysis and empirical assessment of existing agency practices suggest that agencies are making sincere efforts to strike the proper balance between the duty to make government decision-making processes as open and transparent as possible on the one hand, and the recognized need to protect certain types of sensitive materials on the other hand. Agency practices with respect to protected materials reflect considerable variation.

The public rulemaking process would likely benefit from greater harmonization of practices across agencies with respect to policies regarding protected materials. At the same time, differences in the frequency with which agencies encounter CBI and PII and variations in the extent to which agencies depend on access to these materials in order to fulfill their mission favor according agencies a considerable degree of flexibility in striking the proper balance between their duties to disclose and withhold protected materials.

A. Recognition of a Strong Default Presumption in Favor of Disclosure

As noted earlier,³⁰⁰ all decisions regarding the treatment of protected materials must proceed from, in the words of the Supreme Court, a “strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents.”³⁰¹ The interest in disclosure is particularly strong in the context of rulemaking, where information about commenters, such as their names and addresses, can greatly contribute to the public’s understanding of government processes.³⁰² Agency policies should thus favor disclosure of protected materials in the absence of a strong justification for protection.

However, there may be some instances where an agency feels it must withhold material information, whether it involves situations in which the agency relies upon PII submitted about third parties or in which CBI is ultimately crucial to the decision-making process. In those situations, if redaction, anonymization, and aggregation would not be sufficient, the statement of basis and purpose accompanying the final rule required by the APA³⁰³ should inform the public of the general nature of the information being withheld.

B. The Inclusion of Language in All NPRMs Disclosing Agency Policies Regarding Protected Materials

NPRMs represent the document that members of the public are most likely to consult before submitting their comments. Indeed, it is hard to imagine how someone could offer relevant comments to a rulemaking proceeding without referring to the material presented in the NPRM.

The research into agency practices suggests that NPRMs represent agencies’ primary mechanism for informing prospective commentators about their policies with respect to protected materials. Although the NPRMs issued by the vast majority of agencies disclose some important aspects of these policies, they are far from uniform in this regard.

300. See *supra* notes 155–59 and accompanying text.

301. U.S. Dep’t of State v. Ray, 502 U.S. 164, 173 (1991); accord Dep’t of Air Force v. Rose, 425 U.S. 352, 360–61 (1976) (recognizing that FOIA’s “basic purpose reflected ‘a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language’” (quoting S. REP. NO. 89-813, at 3 (1965))).

302. See *supra* notes 156–58 and accompanying text.

303. See *supra* note 47 and accompanying text.

Making sure that all NPRMs contain language addressing the issuing agency's policies on certain key issues would provide better notice and guidance to prospective commentators. The key elements include:

Notice about policies regarding publication of comments, such as whether they are generally posted to the website without review and cannot be changed or whether they are routinely screened before publication.

Specific guidance to avoid submitting PII in the body of comments unless the PII is about the submitter and the submitter is completely aware of the disclosure consequences. This guidance should explain that submitting PII entails a waiver of the submitter's privacy interest in that material.

Specific guidance not to submit CBI in comments unless using the available alternative mechanisms for submitting confidential information and notice that submitting such CBI publicly likely entails a waiver of confidentiality.

Guidance about alternative mechanisms for submitting confidential information.

Notice that the agency reserves the right to redact any submissions in part or in full when making comments available to the public.

Notice about opportunities to challenge decisions about disclosing or withholding information submitted in comments and guidance about how individuals can avail themselves of those processes.

Agencies should have wide latitude to modify these disclosures to fit their particular needs.

C. The Inclusion of Language on Comment Submission Websites Disclosing Agency Policies Regarding Protected Materials

Websites that accept comments in public rulemaking proceedings should provide notice about the same policy practices listed in the discussion of NPRMs. Sample language, adapted from language appearing at the bottom of the comment submission page on Regulations.gov, could read:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. **Do not submit information whose disclosure is restricted by statute**, such as trade secrets or commercial and financial information, via [the online commenting platform]. **Do not submit sensitive personal information**, such as social security numbers or banking information, **or confidential business information, such as trade secrets**, via [the online commenting platform]. To view any additional information for submitting comments, such as anonymous or

sensitive submissions, refer to the [link to detailed information about submitting paper or email comments], the Federal Register notice on which you are commenting, and the [website of the department or agency].

This language places the key warnings on the primary comment page and simplifies the current disclosure by replacing dual links to the “Privacy Notice” and the “User Notice” with a single notice at the bottom of the page. The inclusion of this language and the retention of the link for “Alternate Ways to Comment” gives agencies flexibility in tailoring these notices to their particular circumstances. Although other critical information remains hidden behind a link, it presents the most important information in a way likely to be read by potential commenters without overburdening them. Although pop-up notices of the type employed by the Federal Reserve are better at ensuring that the notice is seen by commenters, they may present a burden that reduces the total number of comments. However, given the relative ease of incorporating pop-ups on agency websites, they represent a low-cost way to ensure that a significant number of commenters see the notice.

D. The Provision of Guidance on How to Submit Comments Containing Confidential Information and the Possible Creation of a Process for Online Submission

One of the most striking areas where agency practices differed is with respect to notice about methods for submitting confidential information other than through general online comments. As noted earlier, the review of NPRMs issued by agencies indicated that only 21% included language about alternative submission systems.³⁰⁴

In addition, four agencies require that comments containing requests for confidential treatment must be made in writing.³⁰⁵ Continuing reliance on paper submission runs counter to the mandates in the E-Government Act of 2002 and Executive Order No. 13,563 to promote online submission of rulemaking comments.

As noted above, agencies should make sure that their NPRMs and comment submission websites provide adequate guidance regarding alternative mechanisms for submitting confidential information.³⁰⁶ The mechanism can reflect either of the two primary mechanisms for permitting the submission of protected information: (1) the inclusion of a prominent notice at the top of the comment along with identification of the information to be redacted³⁰⁷ or (2) the submission of both redacted and unredacted versions of the comment.³⁰⁸

In addition, comment submission websites should consider redesigning their submission pages to enable commenters to submit confidential information online.

304. See *supra* Table 2.

305. See *supra* notes 203, 208 and accompanying text.

306. See *supra* Part III.A–B.

307. See *supra* note 205 and accompanying text.

308. See *supra* note 208 and accompanying text.

E. The Lack of Clear Benefit from Revising SORNs to Include Policies Regarding Protected Materials

Many of the arguments for including information pertaining to policies regarding protected materials in NPRMs and comment submission websites also apply to SORNs. Some agencies indicated that they relied on SORNs to inform prospective commenters about their policies.³⁰⁹ In addition, the survey of SORNs regarding docket management systems revealed that the specific practices disclosed varied widely, even including disclosures that are not made elsewhere, and might benefit from greater uniformity.³¹⁰

Other considerations make SORNs unlikely candidates for informing the public. The statutory definitions limiting SORNs to systems searchable by name or other personal identifiers make them poorly situated to protect materials submitted in anonymous comments or submitted about parties other than the commenter. The difficulty in locating SORNs makes commenters more likely to consult NPRMs, agency websites, or agency regulations. As a result, revision of SORNs to provide more complete disclosures of policies regarding protected materials is likely to provide limited benefit.

F. The Lack of Need to Screen Public Rulemaking Dockets for CBI When the Commenter Has Not Requested Confidentiality

The analysis of the legal requirements suggest that agencies need not undertake additional efforts to screen materials contained in public rulemaking dockets for CBI for which the submitter has not requested confidential treatment. Separate issues are presented by CBI that belong to the party submitting the comment (called for purposes of this report “first-person CBI”) and CBI that belongs to parties other than one submitting the comment (called for purposes of this report “third-person CBI”).

Regarding first-person CBI, the standard for confidentiality established by the Supreme Court’s recent 2019 decision in *Food Marketing Institute v. Argus Leader Media*³¹¹ essentially dictates that any CBI submitted in a rulemaking docket without a request for confidentiality may be disclosable under FOIA Exemption 4. As noted earlier,³¹² this standard currently requires that the information be both “closely held,” though the Court declined to determine whether it *must* be disclosed only under express or implied assurances of nondisclosure in order to be regarded as confidential.³¹³ When the agency has notified commenters that any CBI submitted in comments without a request for confidential treatment will be disclosed to the public, subsequent disclosure of CBI submitted without such a request does not constitute the type of forced breach of good faith promises of nondisclosure by the government that Congress had in mind when it enacted FOIA.³¹⁴ In addition, clear warnings that any CBI submitted in comments without a request for confidential treatment will be

309. See *supra* Table 1.

310. See *supra* Part II.A.4.

311. 139 S. Ct. 2356 (2019).

312. See *supra* notes 127–30 and accompanying text.

313. 139 S. Ct. at 2363–64.

314. See *supra* notes 125, 133 and accompanying text.

disclosed to the public would make any inference of assurances of confidentiality unreasonable and would likely constitute a waiver of any rights to confidentiality.³¹⁵

Third-person CBI presents a somewhat more complicated question. The submission of CBI without a request for confidentiality by someone other than the owner of that CBI can hardly be considered a waiver. In addition, the failure to seek assurances of confidentiality for the CBI can hardly be attributed to the owner when another party was responsible for making it part of the rulemaking docket. However, the access that the submitter had to the third-party CBI also indicates that the information may not be “closely held,” since other parties are aware of it, thus making the information ineligible for exemption.

That said, several judicial decisions suggest that such screening is unnecessary. As noted earlier, courts have held that *Food Marketing Institute*’s first prong, requiring that the information be customarily and actually kept private, applies only to information originating from the CBI holder itself.³¹⁶ In addition, courts have held that the systems of records protected by the Privacy Act do not apply to information about a third party contained in a record about another party.³¹⁷ Finally, the survey conducted by our research team suggests that rulemaking comments rarely contain CBI belonging to third parties.³¹⁸

Agencies thus bear little burden to screen comments for CBI when the submitter has not requested confidential treatment regardless of whether the comment includes first-party or third-party CBI. When commenters do affirmatively request confidential treatment of some material, agencies should process those requests in accordance with their established policies.

G. The Need to Screen All Docket Materials for Certain Types of PII, Possibly Through Computerized Screening

Unlike CBI, the legal analysis suggests that agencies may have a higher obligation to screen public rulemaking dockets for PII. This report addresses separately the issues presented by PII associated with the party submitting the comment (called for purposes of this report “first-person PII”) and the issues presented by PII associated with parties other than one submitting the comment (called for purposes of this report “third-person PII”).

Regarding first-person PII, legal precedent and government policy supports broad disclosure. As noted earlier, federal law endorses a broad presumption in favor of disclosure, and the interest in disclosure is particularly strong in the context of rulemaking.³¹⁹ In addition, certain PII can be important for the public to understand the relevance of particular comments.³²⁰ Finally, commenters’ privacy interests are particularly weak (and may have been waived altogether) when they have foregone available opportunities to confidential submission.³²¹

315. See *supra* note 134 and accompanying text.

316. See *supra* note 131 and accompanying text.

317. See *supra* notes 85–86 and accompanying text.

318. See *supra* Table 5.

319. See *supra* notes 111–13, 154–57, 298–300 and accompanying text.

320. See *supra* notes 156–58 and accompanying text.

321. See *supra* notes 159–61 and accompanying text.

But other considerations favor offering protection to PII in public rulemaking dockets in certain contexts. Courts balancing the public's interest in disclosure against individuals' interest in privacy found the latter particularly strong when disclosure would significantly increase the risk of identity theft or some other similar harm.³²² In addition, the judicial rules implementing the E-Government Act of 2002 require courts to protect certain types of information, including social security numbers, taxpayer-identification numbers, birthdates, names of individuals known to be minors, and financial account numbers.³²³ FOIA cases have similarly blocked disclosure of Social Security numbers, places of birth, dates of birth, dates of marriage, and employment histories, though not explicitly in the rulemaking context.³²⁴ Disclosure of these types of information would provide so little benefit to the public rulemaking process so as to render the risks of invasion of personal privacy unjustified, and thus these specific categories of information likely could be withheld, though the waiver submission indicates withholding is not *required*. Judicial precedent under the E-Government Act reflects reluctance to expand beyond these categories.³²⁵

The obligations to screen for third-party PII are even stronger. Although information about third parties falls outside the definition of system of records under the Privacy Act,³²⁶ it can be protected against disclosure by FOIA Exemption 6 if the statutory criteria are met.³²⁷ Any inferences of waiver from failure to request confidential treatment are clearly improper for third-party PII.³²⁸ In addition, our survey conducted suggests that comments containing third-party PII represent a much more significant concern than comments containing third-party CBI.³²⁹

These sources suggest that agencies may bear some obligation to screen all comments for certain types of PII. Fortunately, these types of PII represent the type of repetitive pattern that is particularly amenable to computer-based screening. Computer-based screening that identifies the specific types of PII enumerated above and redacts that information (or flags it for manual review) could significantly reduce the burden on agencies while still protecting the privacy of commenters who mistakenly submit PII.

H. The Benefits of Providing Guidance and Training to Agency Staff About Standards for Determining What Materials Merit Withholding

The research into the substantive standards used to screen material submitted to public rulemaking dockets revealed that only some agencies screen and that few have

322. See *supra* note 163 and accompanying text.

323. See *supra* notes 28, 36–37 and accompanying text.

324. See *supra* notes 171–72 and accompanying text.

325. See *supra* note 38 and accompanying text.

326. See *supra* notes 85–86, 315 and accompanying text.

327. Note again that while it is not clear whether the FOIA *requires* withholding of third-party PII, it is likely that such information could be disclosed if the agency felt that it would contribute to public understanding of its actions and doing so would not constitute “a clearly unwarranted invasion of personal privacy.” See *supra* Part I.G.6.

328. See *supra* note 161 and accompanying text.

329. See *supra* Tables 5, 7.

set standards when determining what to redact. Some, but not all, agencies reported giving screening personnel guidance regarding how to screen, and that guidance varied widely in its level of specificity. Only two agencies reported requiring formal training of screening staff. Some interview participants expressed concern that individual staff would base decisions on their own conceptions of what is protectable.³³⁰

The adoption and distribution of clear standards of what constitutes protectable material would appear to offer significant benefits in terms of promoting outcomes that are uniform and consistent with the rule of law. As noted earlier, judicial decisions interpreting FOIA Exemptions 4 and 6 provide the best guides for substantive standards, although the E-Government Act of 2002 provides important insights for PII as well. The standards for CBI should largely follow the Supreme Court's recent decision in *Food Marketing Institute v. Argus Leader Media*.³³¹ The standards for PII should follow the list enumerated in Section III.G.

Because of the inherent balancing involved in every FOIA decision, there are not clear, universally recognized standards readily available for agencies to adopt. However, as explored in the preceding section and as suggested by the categories of information protected by the rules governing judicial disclosure issued under the E-Government Act of 2002,³³² agencies should particularly consider including the following types of PII in their screening guidance:

- Birth dates (leaving birth year disclosed)
- Financial account numbers submitted by individuals
- The first five digits of Social Security numbers.
- Places of birth
- Tax-payer identification numbers
- Specific street addresses (leaving zip codes disclosed)

Agencies should also consider requiring periodic privacy training for all agency personnel and specialized training for screening personnel.

I. The Benefits of Providing Clear Internal and External Guidance on Agency Procedures for Decisions Regarding Protected Materials

In addition to providing guidance to commenters regarding processes for asserting claims of confidentiality, good administrative practice suggests that agencies should develop and publicize their procedures for handling such claims.

As noted earlier, one agency confers the power to determine the protectability of claimed material upon the General Counsel or her designee.³³³ Another agency assigns responsibility for initial determinations to its Assistant Secretary for FOI, Privacy and Sunshine Acts Compliance and allows appeals of initial determinations

330. See *supra* Part II.C.2.

331. 139 S. Ct. 2356, 2363–64 (2019).

332. See *supra* notes 28, 36–37 and accompanying text.

333. See *supra* notes 290–91 and accompanying text.

to the General Counsel.³³⁴ Other agencies rely on Ombudsmen to help resolve complaints about disclosure.

To date, challenges to agency decisions regarding confidentiality appear to be rare.³³⁵ Such processes are likely to become more important should the pattern of seeking confidentiality continue to increase in frequency, as one interview subject observed. Because challenges to agency determinations regarding comments are rare, it is unclear which option explored above regarding challenges is best. However, the research team recommends that each agency's website and NPRM designate at least one contact person for commenters to consult regarding possible grievances with respect to withholding or disclosure.

J. The Proper Use of Redaction, Aggregation, and Anonymization Over Full Withholding

As mentioned above, circumstances exist where withholding of certain information is necessary. In those situations, agencies should consider adopting methods of redaction, aggregation, and anonymization that allow the public to review *some* of the information submitted instead of fully withholding a document or comment from the administrative docket or other types of public disclosure.

For example, when PII is submitted in comments, generally only that PII (addresses, birth dates, Social Security numbers, etc.) need be redacted—all other information can be disclosed with those particulars blacked out. CBI can similarly be protected via redaction, especially if agencies require those submitting CBI to submit their own redacted copy. Redaction is the simplest solution for documents and comments where there are scattered instances of CBI or PII.

Anonymization can also be used as a tool to protect a submitter's identity, especially when it involves personal stories of medical history or employment. The best way to allow commenters to take advantage of anonymization is to enable submitters to comment anonymously. That way, an agency does not have the name of the individual at any time and cannot disclose it in any circumstances. When using anonymization, however, agencies should keep in mind that FOIA's explanation of an unwarranted invasion of privacy includes even those situations where names are redacted, but a person with additional knowledge could nonetheless identify the individual.³³⁶

When an agency is confronted with a large amount of confidential information from a number of businesses, agencies should use both aggregation and anonymization to disclose that data. For example, agencies can disclose CBI that includes sensitive numerical data tied to a sufficiently large number of businesses if all identifying information is removed. However, agencies make sure that any businesses are not readily identifiable from the information they disclose. If there is one key statistic that could identify a business, aggregation would not offer sufficient protection.

334. See *supra* notes 292–96 and accompanying text.

335. See *supra* Table 13.

336. See *supra* notes 166–70 and accompanying text.

CONCLUSION

Many agencies are now in the midst of a significant increase of public comments as online commenting portals allow for increased participation across the country. By adopting some or all of the methods mentioned above, agencies can strike the proper balance between honoring their statutory obligations toward openness while still taking care to protect personal and business information privacy. In particular, a focus on providing multiple levels of notice to submitters will allow commenters to make informed decisions about the information they want to disclose, while relieving some of the pressure on the agencies to proactively screen thousands of comments.