



## **Administrative Conference Recommendation 2014-8**

### **“Ex Parte” Communications in Informal Rulemaking**

**Adopted June 6, 2014**

Informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rulemaking proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Borrowing terminology from the judicial context, these communications are often referred to as “ex parte” contacts.<sup>1</sup> Although the APA prohibits ex parte contacts in formal adjudications and formal rulemakings conducted under the trial-like procedures of 5 U.S.C. §§ 556 and 557,<sup>2</sup> 5 U.S.C. § 553 imposes no comparable restriction in the context of informal rulemaking. The term “ex parte” does not entirely fit in this non-adversarial context, and some agencies do not use it. This recommendation uses the term because it is commonly used and widely understood in connection with informal rulemaking. As used in this recommendation, “ex parte communications” means: (i) written or oral communications; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons; and (iv) that are not placed in the rulemaking docket at the time they occur. It bears emphasizing that such communications “are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”<sup>3</sup>

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<sup>1</sup> In the judicial context, “ex parte” contacts are those that are related to the subject of a lawsuit and occur between just one of the parties involved and the presiding judge, usually “without notice to or argument from the adverse party.” BLACK’S LAW DICTIONARY (9th ed. 2009). Unless otherwise authorized by law, such contacts are generally viewed as highly unethical.

<sup>2</sup> See 5 U.S.C. § 557(d).

<sup>3</sup> Home Box Office, Inc. v. Federal Commc’ns Comm’n, 567 F.2d 9, 57 (D.C. Cir. 1977); see also Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981).



In Recommendation 77-3,<sup>4</sup> the Conference expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedural framework established by 5 U.S.C. § 553.<sup>5</sup> At the same time, the Conference concluded, it may be appropriate for agencies to impose certain restraints on ex parte communications to prevent potential or perceived harm to the integrity of informal rulemaking proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid. Over the past several decades, agencies have implemented Recommendation 77-3 by experimenting with procedures designed to capture the benefits of ex parte communications while reducing or eliminating their potential harm. This recommendation draws on this substantial experience to identify best practices for managing ex parte communications received in connection with informal rulemakings.

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.<sup>6</sup>

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<sup>4</sup> Recommendation 77-3 emerged from a select committee the Conference convened in response to the D.C. Circuit's groundbreaking decision in *Home Box Office*. See Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 377 (1978). Following the recommendation's adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. See Nathanson, 30 ADMIN L. REV. at 406-08.

<sup>5</sup> See Admin. Conf. of the United States, Recommendation 77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

<sup>6</sup> In such areas, interested persons may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the



On the other hand, ex parte communications can pose several different kinds of harm (both real and perceived) to the integrity of the rulemaking process. One difficulty is that certain people or groups may have, or be perceived to have, greater access to agency personnel than others. This unfairness, whether real or perceived, may be exacerbated if agency personnel do not have the time and resources to meet with everyone who requests a face-to-face meeting. Another concern is that agency decisionmakers may be influenced by information that is not in the public rulemaking docket. The mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process. When it becomes reality, it creates different and more serious problems. Interested persons may be deprived of the opportunity to vet the information and reply to it effectively. And reviewing courts may be deprived of information that is necessary to fully and meaningfully evaluate the agency's final action.

Best practices for preventing the potential harms of ex parte communications may vary depending on the stage of the rulemaking process during which the communications occur. Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.<sup>7</sup> Communications during this early stage of the process are less likely to pose the harms described above and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.<sup>8</sup> After an NPRM has been issued and during the comment period, there may be a heightened expectation that information submitted to the agency will be made available to

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information shared with them confidential. *See, e.g.*, 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.

<sup>7</sup> Recognizing these principles, the Clinton Administration directed agencies “to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule,” with the limited exception of “rules requiring the simple disclosure of the time, place, purpose, and participants of meetings.” *See* Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), *available at* [http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20\(1995\).txt](http://www.dot.gov/sites/dot.dev/files/docs/Presidential%20Memorandum%20-%20Regulatory%20Reinvention%20(1995).txt) (last visited Mar. 10, 2014). This memorandum, which has never been revoked, continues to inform agency practice.

<sup>8</sup> *See id.*



the public. Indeed, during this time period, an agency's comment policy and its policy addressing ex parte communications may both apply.<sup>9</sup> Finally, once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period. Agencies have in some circumstances disclosed significant new information received through such communications and reopened the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.

This recommendation focuses on how agencies can best manage ex parte communications in the context of informal rulemaking proceedings, including those that involve "quasi-adjudication among 'conflicting private claims to valuable privilege.'"<sup>10</sup> It does not address several related or peripheral issues. First, it does not evaluate formal or hybrid rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures to develop guidance documents. Second, it does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA).<sup>11</sup> Third, it does not examine interagency communications outside the process of executive review. Fourth, it does not address intraagency interactions between an agency's staff and its decisionmakers.<sup>12</sup> Finally, it does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.

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<sup>9</sup> The Conference recently addressed agency comment policies. See Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>10</sup> *Sierra Club*, 657 F.2d at 400 (quoting *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959)). In such "quasi-adjudicatory" rulemakings, due process considerations may justify insulating the decisionmaker from ex parte contacts. See *id.*

<sup>11</sup> See Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

<sup>12</sup> See 5 U.S.C. § 557(d).



## RECOMMENDATION

### **“Ex Parte” Policies**

1. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles what this recommendation refers to as nongovernmental “ex parte” communications, even if the agency does not use that term.

2. Agency ex parte policies should:

(a) Provide guidance to agency personnel on how to respond to requests for private meetings to discuss issues related to a rulemaking.

(b) Explain the scope of their coverage, which should be limited to communications on substantive matters and should exclude non-substantive inquiries, such as those regarding the status of a rulemaking or the agency’s procedures.

(c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.

(d) Establish procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket.

(e) Explain how the agency will treat significant new information submitted to the agency after the comment period has closed.

(f) Identify deadlines for all required or requested disclosures of ex parte communications.

(g) Explain how the agency will treat sensitive information submitted in an ex parte communication.



(h) Explain how the agency's ex parte communications policy interacts with its comment policy.

3. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:

(a) The stage of the rulemaking proceeding during which oral or written communications may be received.

(b) The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.

(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.

(d) The likelihood that protected information will be submitted to the agency through oral or written ex parte communications.

(e) The possibility that, even if an agency discourages ex parte communications during specified stages of the rulemaking process, such communications may nonetheless occur.

(f) The potential need to give agency personnel guidance about whether or to what extent to provide information to persons not employed by the agency during a face-to-face meeting.

#### **Communications before an NPRM Is Issued**

4. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.

5. Agencies may, however, disclose, in accordance with ¶ 8 of this recommendation, the occurrence or content of ex parte communications received before an NPRM is issued, as follows:



- (a) In the preamble of the later-issued NPRM or other rulemaking document; or
- (b) In the appropriate rulemaking docket once it is opened.

### **Communications after an NPRM Has Been Issued**

6. If an agency cannot accommodate all requests for in-person meetings after an NPRM has been issued, it should consider holding a public meeting (which may be informal) in lieu of or in addition to individual, private meetings.

7. After an NPRM has been issued, agencies should disclose to the public:

(a) The occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.

(b) The content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:

(i) Direct their own personnel to prepare and submit the necessary summary; or

(ii) Request or require private persons to prepare and submit the necessary summary of meetings in which they have participated, although it remains the agency's responsibility to ensure adequate disclosure.

(c) All written submissions, in the appropriate rulemaking docket.

### **Additional Considerations after the Comment Period Has Closed**

8. Agencies should determine whether, and under what circumstances, ex parte communications made after the close of the comment period should be permitted and, if so, how they should be considered.

9. If an agency receives, through an ex parte communication, any significant new information that its decisionmakers choose to consider or rely upon, it should disclose the



information and consider reopening the comment period, to provide the public with an opportunity to respond.

10. When an agency receives a large number of requests for ex parte meetings after the comment period has closed, it should consider using a reply comment period or offering other opportunities for receiving public input on submitted comments. *See Admin. Conf. of the United States, Recommendation 2011-2, Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011) (encouraging the use of reply comment periods and other methods of receiving public input on previously submitted comments).

### **Quasi-Adjudicatory Rulemakings**

11. If an agency conducts “quasi-adjudicatory” rulemakings that involve conflicting private claims to a valuable privilege, its ex parte communications policy should clearly and distinctly articulate the principles and procedures applicable in those rulemakings.

12. Agencies should explain whether, how, and why they are prohibiting or restricting ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex parte communications in this context require a different approach from the one otherwise recommended here.

13. Agencies should explain and provide a rationale for any additional procedures applicable to ex parte communications received in quasi-adjudicatory rulemakings.

### **Accommodating Digital Technology**

14. Agencies should consider how digital technology may aid the management or disclosure of ex parte communications. For example, agencies may be able to use technological tools such as video teleconferencing as a cost effective way to engage with interested persons.

15. Agencies should avoid using language that will inadvertently exclude ex parte communications made via digital or other new technologies from their policies.





16. Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media.