

From: Murray, Claire M. (OASG)
To: Maloney, Stephanie (ENRD)
Subject: FW: AR Guidance question
Date: Monday, May 11, 2020 4:43:05 PM

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Wednesday, April 1, 2020 10:20 AM
To: Murray, Claire M. (OASG) (b) (6); Cox, Stephen (OASG) (b) (6); Davis, Patrick (OASG) (b) (6)
Subject: FW: AR Guidance question

From: Ellis, Jonathan (OSG) (b) (6)
Sent: Tuesday, March 31, 2020 9:53 PM
To: Allen, Katherine T. (OASG) (b) (6); Mooppan, Hashim (CIV) (b) (6)
Cc: Joshi, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: RE: AR Guidance question

I agree that it's not entirely clear, but agree that it can be read as Hash suggests – and agree that it should be.

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Tuesday, March 31, 2020 9:22 PM
To: Mooppan, Hashim (CIV) (b) (6)
Cc: Ellis, Jonathan (OSG) (b) (6); Joshi, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: Re: AR Guidance question

I hope you're right! That would make reconciling these comments/positions much easier.

Sent from my iPhone

On Mar 31, 2020, at 9:18 PM, Mooppan, Hashim (CIV) (b) (6) > wrote:

Fwiw, I read that sentence as follows:

(b) (5)

In other words, I think (b) (5)

In all events, (b) (5)

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Tuesday, March 31, 2020 9:09 PM
To: Mooppan, Hashim (CIV) (b) (6)
Cc: Ellis, Jonathan (OSG) (b) (6); Joshi, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: Re: AR Guidance question

I read this:

(b) (5)

(b) (5)

(b) (5)

Sent from my iPhone

On Mar 31, 2020, at 9:03 PM, Mooppan, Hashim (CIV)(b) (6) wrote:

Isn't that exactly what the highlighted material says?

From: Allen, Katherine T. (OASG)(b) (6)
Sent: Tuesday, March 31, 2020 8:58 PM
To: Mooppan, Hashim (CIV)(b) (6); Ellis, Jonathan (OSG)(b) (6)
Cc: Josh, Sopan (OSG)(b) (6); Michel, Christopher (OSG)(b) (6)
Subject: RE: AR Guidance question

(b) (5)

From: Mooppan, Hashim (CIV)(b) (6)
Sent: Tuesday, March 31, 2020 8:56 PM
To: Allen, Katherine T. (OASG)(b) (6); Ellis, Jonathan (OSG)(b) (6)
Cc: Josh, Sopan (OSG)(b) (6); Michel, Christopher (OSG)(b) (6)
Subject: RE: AR Guidance question

Isn't the highlighted material in context, only talking about (b) (5)

From: Allen, Katherine T. (OASG)(b) (6)
Sent: Tuesday, March 31, 2020 8:44 PM
To: Ellis, Jonathan (OSG)(b) (6); Mooppan, Hashim (CIV)(b) (6)
Cc: Josh, Sopan (OSG)(b) (6); Michel, Christopher (OSG)(b) (6)
Subject: RE: AR Guidance question

Jonathan,

This makes sense to me, but I read the portions of the (b) (5)

1. (b) (5)
- (b) (5)
- (b) (5)
- (b) (5)
- (b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

c) (b) (5)

(b) (5)

(b) (5)

From: Ellis, Jonathan (OSG) (b) (6)
Sent: Tuesday, March 31, 2020 9:47 AM
To: Mooppan, Hashim (CIV) (b) (6); Allen, Katherine T. (OASG) (b) (6)
Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: RE: AR Guidance question

I don't recall the specific edits, but I suspect they were intended to reflect (b) (5)

From: Mooppan, Hashim (CIV) (b) (6)
Sent: Monday, March 30, 2020 8:35 PM
To: Allen, Katherine T. (OASG) (b) (6); Ellis, Jonathan (OSG) (b) (6)
Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: RE: AR Guidance question

(b) (5)

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Monday, March 30, 2020 7:34 PM
To: Ellis, Jonathan (OSG) (b) (6); Mooppan, Hashim (CIV) (b) (6)
Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: RE: AR Guidance question

One additional question on this. There is a section titled (b) (5)

Thanks!

From: Ellis, Jonathan (OSG) (b) (6)
Sent: Thursday, March 26, 2020 9:59 AM
To: Allen, Katherine T. (OASG) (b) (6); Mooppan, Hashim (CIV) (b) (6)
Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)
Subject: RE: AR Guidance question

(b) (5)

(b) (5)

. Right?

From: Allen, Katherine T. (OASG) (b) (6)

Sent: Wednesday, March 25, 2020 7:24 PM

To: Ellis, Jonathan (OSG) (b) (6); Mooppan, Hashim (CIV) (b) (6)

Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)

Subject: RE: AR Guidance question

OK thanks. I was basing it off of these comments and suggested changes from OSG (in yellow). We will try to massage the point.

Comment: OSG Comment: This comment applies here and throughout the document: (b) (5)

(b) (5)

Edit:

(b) (5)

(b) (5)

Another comment (Jonathan: I think this is the point you are referring to)

(b) (5)

(b) (5)

(b) (5)

That might be a useful concept here.

From: Ellis, Jonathan (OSG) (b) (6)

Sent: Wednesday, March 25, 2020 6:08 PM

To: Mooppan, Hashim (CIV) (b) (6); Allen, Katherine T. (OASG)

(b) (6)

Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6)

Subject: RE: AR Guidance question

(b) (5) I agree that they are materially consistent with (b) (5)

(b) (5). I also agree that the analysis really turns on

(b) (5)

(b) (5)

(b) (5)

in any event, we also argued (b) (5)

From: Mooppan, Hashim (CIV) (b) (6)

Sent: Wednesday, March 25, 2020 5:43 PM

To: Allen, Katherine T. (OSG) (b) (6)

Cc: Josh, Sopan (OSG) (b) (6); Michel, Christopher (OSG) (b) (6); Ellis, Jonathan (OSG) (b) (6)

Subject: Re: AR Guidance question

To be clear, I'm not at all sure that the (b) (5)

Sent from my iPhone

On Mar 25, 2020, at 5:34 PM, Allen, Katherine T. (OSG) (b) (6) wrote:

Hi Sopan,

Sorry to bug you about this again, but from the emails from Hash and Tom it sounds (b) (5)

But one of the OSG comments on the AR Guidance memo was (b) (5)

Are you all aware of any other instances in which we've taken the position (b) (5)

Thanks,

Katherine

From: Joshi, Sopan (OSG) (b) (6)

Sent: Tuesday, March 24, 2020 8:18 AM

To: Allen, Katherine T. (OSG) (b) (6); Michel, Christopher (OSG)

(b) (6)

Cc: Ellis, Jonathan (OSG) (b) (6); Mooppan, Hashim (CIV)

(b) (6)

Subject: RE: AR Guidance question

[Adding Hash]

Hi Katherine,

I'm honestly not sure how (b) (5)

But as you suggest, ultimately you might need to tap into

Ed's institutional memory on this.

That said (b) (5)

Thanks,
Sopan

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Monday, March 23, 2020 5:13 PM
To: Michel, Christopher (OSG) (b) (6)
Cc: Ellis, Jonathan (OSG) (b) (6); Joshi, Sopan (OSG) (b) (6)
Subject: RE: AR Guidance question

Hi Jonathan and Sopan,

Do you know the answer to the question posed below? We are trying to figure out (b) (5)

Please let me know if you all know or if not, so that we could raise it with Ed.

Thanks,

Katherine

From: Michel, Christopher (OSG) (b) (6)
Sent: Thursday, March 19, 2020 3:46 PM
To: Allen, Katherine T. (OASG) (b) (6)
Cc: Ellis, Jonathan (OSG) (b) (6); Joshi, Sopan (OSG) (b) (6)
Subject: RE: AR Guidance question

Hi Katherine, I'm copying Jonathan and Sopan, who were the experts on the AR aspects of the document in light of their experience on DACA and Census, respectively. Thanks and hope all is well! Chris

From: Allen, Katherine T. (OASG) (b) (6)
Sent: Thursday, March 19, 2020 3:43 PM
To: Michel, Christopher (OSG) (b) (6)
Subject: AR Guidance question

Hi Chris,

I'm still working on this AR Guidance memo and was wondering, one of OSG's main substantive comments is that we (b) (5)

Do you know if there are (b) (5)
I'm just trying to better understand the (b) (5)

Thanks!

Katherine Twomey Allen

Deputy Associate Attorney General
Office of the Associate Attorney General
U.S. Department of Justice
(b) (6)

Memorandum for the Attorney General
Subject: Administrative Record Guidelines Memorandum

Page 3

[Last page is signature page only]

APPROVE: _____

Concurring Component(s):

None

DISAPPROVE: _____

Non-concurring Component(s):

None

OTHER: _____

Attachment(s): Administrative Record Guidelines Memorandum

**Department of Justice
EXECUTIVE SECRETARIAT
eCATS Summary Sheet**

Work Package Status: Active

Document Date: 1/10/2023

Work Package ID: ECATS-2023-149033

Date Received: 1/11/2023

Step Due Date: 1/17/2023

Sensitive? No

Classified? No

Expedited? No

From: The Honorable Hampton Dellinger
Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
Washington, DC 20530

To: AG, Garland

Mail Type: Action Memorandum (Controlled)

Sub Mail Type:

3rd Mail Type:

Service Code: AG Approval

Description: Requesting AG approval on the attached Administrative Records Guidelines Memorandum.

Current Step: Action Component & Action Requested
OASG, ASG for Clearance (Clearance)

Info Component:

Comments:

ExecSec POC: LaWanda Prescott

ECATS-2023-149033

FOIA 2024-06507_0040427

From: Office of Legal Policy (JMD) </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS /CN=2F946AB4E81F4439AB53C9D110908588-OFFICE OF L>
To: Office of Legal Policy (JMD)
Sent: 8/3/2023 1:31:24 PM
Subject: Guidelines for the Creation and Compilation of Administrative Records
Attachments: Administrative Records Guidelines - Final.pdf

Dear Heads of Components:

Please see the attached memorandum regarding the Department of Justice's guidelines for the creation and compilation of administrative records. Once you have reviewed the memorandum, please share it with the appropriate personnel in your offices.

Best,

Susan M. Davies
Acting Assistant Attorney General
Office of Legal Policy

Bcc: Chiefs of Staff



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM TO HEADS OF DEPARTMENT COMPONENTS

FROM: Susan M. Davies **SUSAN DAVIES** Digitally signed by SUSAN DAVIES
Date: 2023.07.18 12:45:33 -0400
Acting Assistant Attorney General
Office of Legal Policy

SUBJECT: Department of Justice Guidelines for the Creation and Compilation of
Administrative Records

I. Introduction

This document provides guidelines for Department of Justice personnel involved in rulemaking and adjudication when assisting with the creation and compilation of administrative records of final agency actions.¹

The principles outlined below are intended to help inform Department staff involved in rulemaking and adjudication—as distinct from Department attorneys in their litigating roles—about best practices for the creation and compilation of administrative records. These guidelines are also intended to ensure that information considered in Department rulemaking or adjudication is appropriately collected, saved, and organized,² such that the agency's record of decisionmaking captures all relevant information underlying the final agency action. This type of thorough internal recordkeeping will allow the Department to compile a complete administrative record for judicial review in the event the final decision is challenged and may reduce the likelihood of adverse consequences in litigation.

The development of the administrative record for purposes of judicial review is a highly case-specific endeavor, and the final compilation of an administrative record should occur under the supervision of Department litigation counsel. Because litigation counsel do not typically oversee

¹ This guidance focuses on the creation and compilation of administrative records in informal rulemaking, also known as "notice-and-comment rulemaking," and informal adjudication. These categories include the vast majority of what agencies do. By contrast, the Administrative Procedure Act sets forth the contents of the "exclusive record" in formal rulemaking and adjudicative proceedings, both of which involve trial-like hearings generally involving an administrative law judge or other hearing officer, and are more rare. See 5 U.S.C. § 556(e); see also *id.* §§ 554, 556–557.

² This guidance addresses recordkeeping only in the context of the creation and compilation of administrative records. It does not speak to, for example, federal recordkeeping requirements under the Federal Records Act, 44 U.S.C. ch. 31; general preservation duties in litigation; or any other judicial, statutory, or regulatory obligation concerning document retention.

the process that results in an administrative decision, however, these guidelines are intended to assist staff: (1) to appropriately document the decisionmaking process from its inception to conclusion; (2) to help ensure, in consultation with counsel, that the record reflects the agency's compliance with the requirements for agency decisionmaking; (3) to make certain that the record demonstrates the agency's consideration of all factors relevant to the decision, whether or not favorable to the outcome; and (4) to consult with litigation counsel prior to final agency decision where appropriate, in the circumstances described below.

This document provides internal Department guidance only. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law or in equity by any party in any matter or proceeding. Nor does it place any limitations on otherwise lawful privileges or litigation prerogatives of the Department of Justice. This document provides nonpublic litigation strategy and legal advice related to potential legal challenges. It should not be shared outside the Department of Justice or provided in response to Freedom of Information Act (FOIA) requests.

II. Overview of the Administrative Record

The administrative record is a set of non-privileged documents reflecting information that the agency decisionmaker considered, directly or indirectly, in reaching a final agency decision. It documents the agency's decisionmaking process and includes the basis and rationale for the final action. An administrative record should contain all of the evidence considered in the decisionmaking process, including not only materials supportive of the agency's decision but also materials contrary to the agency's final decision.

The administrative record comprises those materials that were "before [the decisionmaker] *at the time he made his decision.*" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added). It is therefore critical to ensure that the record that exists at the time of final decision tells the complete story of the agency's decisionmaking process. Ordinarily, the Department will not have an opportunity to add documents to the record that are created after the agency decision becomes final. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

The Department's final agency actions are generally subject to review under the Administrative Procedure Act (APA), which instructs courts to evaluate agency action based upon the "whole record." *See* 5 U.S.C. § 706. Thus, in actions challenging Department regulatory or adjudicative actions, judicial review should focus exclusively on the administrative record. When a final action of the Department is challenged in court, the Department is generally required to make the administrative record available to other litigants, and to file all or part of the administrative record with the court.

Courts look to the administrative record to determine whether the Department's regulatory or adjudicative actions are reasonable and consistent with applicable legal standards. Creating a robust, accurate, and complete administrative record is instrumental in demonstrating that the Department considered all relevant factors in making a final agency decision and made a reasonable judgment given the facts. The administrative record should thus:

- Tell the complete story of the agency's decisionmaking process, from inception to conclusion, including alternative courses of action considered and why they were not adopted;
- Provide a record of all relevant substantive information that was considered, directly or indirectly, by the final decisionmaker, including any information considered that was contrary to the final decision;
- Demonstrate that the agency complied with relevant statutory and regulatory requirements in reaching its final decision; and
- Show that the agency followed a reasoned decisionmaking process.

Failure to create and compile an adequate record can have detrimental consequences for the Department if that action is challenged in court. It may, for example, result in the challenged action being enjoined, vacated, or remanded to the agency for additional explanation. Presenting an inadequate record could also prompt a court to order the Department to complete or supplement the record, which can be a time- and resource-intensive process. Informed and conscientious participation in the creation and compilation of the administrative record by Department staff will help to avoid these adverse results.

III. The Role of Staff in Preparing an Administrative Record

Department staff play a key role in ensuring that administrative records are complete, accurate, and appropriately document the agency's decisionmaking process. Although the administrative record for purposes of litigation is officially compiled after the agency's decision is challenged in court, the work that the Department's components perform prior to the agency's final decision creates the universe of materials that become the administrative record. Department staff should generally follow these guidelines to help ensure the Department's final agency actions are properly memorialized and supported by materials demonstrating the agency's reasoned decisionmaking, and to put Department litigators in the best position to defend these actions in court in the event they face legal challenge.

A. Beginning the Process

Consideration of what documents should constitute the administrative record, and compilation of those documents, should begin at the outset of the decisionmaking process. This process begins when the agency starts its consideration of a decision, which will vary depending on the facts and circumstances of the situation. Broadly speaking, however, materials should be compiled from the time the agency begins working toward a concrete goal—for example, development of a rule or adjudication of an application or waiver request—as opposed to conducting generalized research (although the results of general research may eventually be included in the administrative record to the extent they are relevant and inform the decisionmaking process).

B. Document, Organize, Consult

Once a Department component has initiated a process expected to result in final agency action, staff should generally adhere to the following steps to support the development of the administrative record during that process:

- **Designate a custodian.** At the outset of the process, Department components and bureaus involved in each rulemaking or adjudication should designate a custodian responsible for maintaining the record on an ongoing basis. Depending on organization, staffing, and the volume of rulemaking or adjudication activity within an individual component, a single person may perform this function for multiple agency actions, or a different custodian may be assigned to each agency action. The custodian may delegate responsibility as appropriate, particularly when a rulemaking or adjudication is especially complicated. But the goal should remain to have at least one individual with insight into the entire decisionmaking process. That custodian should be responsible for ensuring that all materials considered or relied upon are compiled periodically as they are generated or received during the decisionmaking process, thus maintaining a reasonably contemporaneous record of the decision. As the person most familiar with the compilation of the record, the custodian will be expected to assist litigation counsel in preparing the administrative record in the event the decision faces legal challenge, and when necessary, to certify the contents of the record provided to the court and other litigants. An appropriate transfer of custodial duties should occur in the event of a change in personnel.
- **Create a decision file.** When the decisionmaking process begins, the custodian should create, or supervise the creation of, an electronic file that will serve as a central repository for all of the materials the agency considers in reaching its final decision. The decision file should be kept in an accessible location and organized logically. Depending on the type of action and the volume of materials considered, it may be appropriate to organize documents chronologically; to divide the materials considered into subfolders based on topic or type of material; or to maintain an index of documents saved in the file. The decision file may be kept in a shared folder to which all persons working on a decision have access. Regardless of the organizational method selected, however, the custodian should ensure that all appropriate documents are placed in the file, and that they are labeled with a standardized naming convention and dated. Placing a document in the decision file does not provide license to destroy the native file.
- **Populate the decision file.** After creating the decision file, the custodian should ensure that it is populated appropriately with materials the agency considers as the decisionmaking progresses. Whether the agency has “considered” a document can involve both legal analysis and factual determinations, which may require consultation with litigation counsel. But for the purposes of compiling the decision file, Department staff should interpret the term “considered” broadly. The component’s counsel, in consultation with litigators, will make the ultimate decision as to whether a document belongs in the final administrative record. At this stage, staff should err on the side of inclusion and should not exclude any materials considered during the decisionmaking process from the file unless at the specific direction of counsel.

It is important that the decision file include all relevant materials considered, whether they support the agency's ultimate decision or not. The materials in the decision file should tell the story of the decisionmaking process and demonstrate the Department's reasoned basis for choosing one course of action over another. This story includes consideration of options not taken, as well as consideration of facts and arguments contrary to the ultimate decision.

Although this list is neither exhaustive nor mandatory, the following materials are typically included in an administrative record, and should thus be added to the decision file where they exist:

- In the adjudication context, all applications and supporting documents submitted with a petition or application, and any response by the agency;
- In the rulemaking context, all Federal Register notices concerning, and all comments submitted in response to, the rule;³
- Factual and technical information, data, or scientific studies cited in the final decision or otherwise considered by the decisionmaker or subordinates during the process of evaluating options;
- Policies, guidelines, directives, and manuals cited in the final decision or otherwise considered by the decisionmaker or subordinates during the process of evaluating options;
- Records of any meetings with the members of the public concerning the agency's proposed action, as well as any materials presented at those meetings by the agency or the public;
- Any decision memorandum or other documents explaining the reasoning and justification for the agency's ultimate action; and
- The final decision document signed by an agency official with authority to make a decision on behalf of the agency.

Records of communications with individuals outside the agency—including emails, meetings, and phone calls—should be included in the decision file when they reflect substantive information considered as part of the decisionmaking process. Individuals outside the agency include non-governmental third parties, members of the public, members of Congress and their staff, and employees of other agencies.⁴ The custodian may wish to segregate these categories of materials in subfolders for easy identification.

³ The comments included in an administrative record typically mirror those posted publicly on Regulations.gov. As such, particularly where comments are voluminous, and in consultation with litigation counsel or, as applicable, the component's counsel, the custodian may use Regulations.gov as the repository for comments submitted in response to a Federal Register notice, rather than adding to the decision file comments that are already publicly available.

⁴ As discussed further below, interagency communications will often be deliberative, and thus not properly included in an administrative record for judicial review. Substantive communications with other agencies that include

Materials considered that were not originally in electronic form—such as comments submitted by mail or physical copies of research materials—should be converted into electronic format and added to the decision file. Records of meetings, phone calls, or other oral communications should be documented in the form of transcripts, minutes, or memoranda to file. Websites or other dynamic materials should be downloaded and saved in a permanent form that indicates the web address and date downloaded.

- **Memorialize the process.** The custodian should document what materials are placed in the decision file, when it happened, the source of the materials, where they are saved, and if not obvious, a short description of why the materials are included. Such a contemporaneous record will refresh the custodian's recollection about the process if necessary, inform any ultimate decision as to whether the documents in the decision file belong in the final administrative record, and allow litigators more easily to identify any potential missing information. Depending on factors like the number of documents in the decision file and agency resources, the custodian may wish to document the process in the form of a draft index of all documents in the administrative record. In situations in which an agency decision faces litigation, the custodian will work with litigation counsel to create an index of the administrative record for filing with the court; working on the index throughout the decisionmaking process can facilitate that process and avoid later duplication of efforts.
- **Close the file after final agency action.** After the decision in question becomes final—by, for example, publication of a final rule or issuance of a decision not subject to further appeal within the agency—the custodian should take steps to ensure that the signed, final decision document, and any other material memorializing the rationale for the decision, is included in the decision file. The custodian should also ensure that any materials that are added to the file following a final agency decision were actually considered, directly or indirectly, by the decisionmaker prior to final agency action. Finally, the custodian should also ensure that the decision file is saved in a location that is known and easily accessible, and that the file includes documentation of the compilation process. In the event that custodians leave their position, they should ensure that another staff member is generally aware of the location and contents of the decision file.
- **In the event of litigation, compile the record for judicial review.** If the final agency decision is challenged in court, Department staff in general, and the custodian in particular, should prepare the administrative record for judicial review in consultation with counsel. This includes giving litigation counsel access to the decision file as requested; discussing with counsel the decisionmaking process and the process of compiling the decision file, including who was involved and the steps taken; flagging for counsel any questions or concerns; making the final determination as to the contents of the record; and once the contents of the record are determined, preparing an index of those documents. A Department employee, ideally the custodian, will also be expected to sign a certification that the record presented to the court is complete and accurate.

information considered in reaching a final agency decision, such as emails providing facts, data, or other objective information, should nonetheless be saved in the decision file.

C. Deliberative and Privileged Documents

Department staff may have encountered the issue of whether deliberative or otherwise privileged documents belong in an administrative record or should be recorded in a privilege log.⁵ This topic presents a number of circumstance-dependent legal questions that should only be answered in consultation with Department litigators after suit has been filed. For example, determining whether a document is deliberative or privileged often requires a fact-specific analysis by litigation counsel. Moreover, although courts have, at times, ordered agencies to produce privilege logs in connection with administrative records, the Department's position is that deliberative materials are not properly part of the administrative record and therefore such logs are not required in litigation.⁶ The ultimate decision as to what potentially privileged documents should be included in the record, and whether a privilege log should be prepared, is properly the responsibility of litigation counsel.

For the purposes of compiling a decision file prior to litigation, Department staff should not exclude any document from the decision file because they believe that document to be deliberative or otherwise privileged. Staff should err on the side of including all documents—including documents that could be privileged—considered in reaching a final agency decision. Doing so will allow litigation counsel to make the ultimate decision about whether a potentially privileged document is properly included in the administrative record. It may be appropriate, however, for the custodian to maintain a separate subfolder or subfolders within the decision file containing potentially privileged documents for ease of later review by counsel. The process of segregating potentially privileged documents into a separate subfolder or subfolders should be taken in consultation with component counsel and, as applicable, litigation counsel. In addition, staff should ensure that information relevant to the final agency action is appropriately preserved whether or not it is included in the decision file.

Should the litigators inform the agency that a privilege log is required as a result of a court order, or is otherwise necessary, Department staff will be responsible for working with component counsel and litigation counsel to prepare the log. Staff do not need to prepare a privilege log unless and until directed to do so, at which point the litigators will provide further instruction.

IV. Litigation Risk Review

Because courts consider the administrative record complete at the time of a final agency decision, the Department will not typically have the opportunity to add documents that were not considered prior to the final decision to the record in litigation. It is therefore important for the

⁵ Certain administrative records may also include law-enforcement sensitive information. Components should consult with litigation counsel about documents containing such information, which can potentially be produced pursuant to a protective order or addressed by redactions as directed by litigation counsel.

⁶ The Department of Justice has taken the consistent position that “documents that reflect predecisional deliberations within the agency are not part of the administrative record in the first instance,” and a privilege log memorializing such documents is accordingly not required. *See, e.g.,* Petition for a Writ of Mandamus at 7–8, *In re Price*, No. 17-71121 (9th Cir. Apr. 19, 2017); *accord, e.g., San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc). District courts have at times reached different conclusions, however, as to whether the agency must produce a privilege log in actions decided on the administrative record, and the Department has complied with court orders requiring agencies the Department represents to produce privilege logs.

Department to consider the adequacy of the record supporting the agency's decision prior to the finalization of each agency action. Specifically, in cases where the Department expects significant legal challenge to its anticipated action, Department litigators should be involved in that review process. Of course, it is neither necessary nor feasible for the Department to conduct pre-finalization litigation review of every agency action potentially subject to challenge under the APA, or for the Department to assemble a complete record prior to litigation. This section discusses (1) how Department components should identify agency actions that are likely to warrant review for litigation risk prior to final agency action, and (2) the recommended processes for conducting pre-finalization litigation review. In instances where a bureau or component already has a system of pre-finalization litigation risk review of agency actions subject to challenge under the APA, this guidance may augment and inform, rather than replace, that system.

A. Actions Likely to Face Significant Legal Challenge

Supervisory agency staff responsible for preparing final agency actions should, in consultation with component and sub-component leadership, as applicable, identify in the first instance agency actions likely to face significant legal challenge.

An agency action is likely to face "significant legal challenge" when the Department anticipates one or more lawsuits that have one or more of the following characteristics: challenging a Department policy that affects the public at large in a meaningful way; raising arguments that have a reasonable likelihood of success; or implicating agency actions that implement Department or Administration priorities, are the subject of congressional or mainstream media interest, or are otherwise particularly noteworthy or controversial. Rulemaking actions⁷ that generate a large number or wide variety of substantive critical comments during a notice-and-comment period or are undertaken without allowing prior notice and comment are more likely to face significant legal challenge. Conversely, rulemaking actions that receive few negative comments or that involve internal matters of agency management or procedure only are unlikely to face significant legal challenge. Similarly, agency adjudications that affect only the party to the controversy are not likely to face what this section defines as *significant* legal challenge even if they are challenged in federal court.

B. Litigation Risk Review

Where supervisory agency staff determines that a future agency action is likely to face significant legal challenge, that risk should be flagged for component leadership well in advance of finalization of the agency action. In the rulemaking context, the Office of Legal Policy regulatory team should also be informed of such requests as part of the regulatory review process.⁸ Component leadership should then, generally in consultation with the Office of Legal Policy, contact the Civil Division with a copy of the draft agency action, an explanation of why the bureau or component believes the action is likely to face significant legal challenge, and a request for

⁷ Although individual circumstances may differ, these criteria will typically apply to final agency actions undertaken through rulemaking, rather than adjudication.

⁸ That team currently consists of Kevin Jones (b) (6), Robert Hinchman (b) (6), and Eric Gomsen (b) (6).

litigation risk review and suggestions to mitigate that risk, including analysis of the materials in the decision file for potential inclusion in the administrative record.

Except in case of emergency, the requesting component should provide the Civil Division at least a week to conduct its review—and longer for particularly lengthy or complicated actions. In the case of an agency rule (as opposed to an adjudication), the Civil Division's review should be conducted, and its views taken into account, before the Office of Management and Budget engages in formal review of that rule.

In most cases, litigators need not review the actual rulemaking or adjudicatory record at this stage in the process, but they should review the draft agency action with an eye toward what materials should be included in the record, and identify any deficiencies that might exist. Department staff should endeavor to take the views of the Civil Division into account before advancing the agency decisionmaking process to the next stage.

V. Conclusion

The guidelines set forth above are intended to help inform Department staff involved in rulemaking and adjudication about best practices for the creation and compilation of administrative records. The guidelines are also intended to ensure that information considered in Department rulemaking or adjudication is appropriately collected, saved, and organized, such that the agency's record of decisionmaking captures all relevant information underlying the final agency action. To the extent that Department staff have any questions about the guidelines, they should contact the Front Offices of the Civil Division or the Office of Legal Policy for assistance.