



Public Employees for Environmental Responsibility

962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910

Phone: (202) 265-PEER • Fax: (202) 265-4192

Email: info@peer.org • Web: <http://www.peer.org>

Administrative Record – Survey of Standards Across Circuits and Agencies

January 2019

Circuit Decisions	
1 st Cir.	<p>The court may consider information outside of the official record “when the agency has excluded . . . pertinent material that is otherwise located within its files, but which the agency chooses to exclude in an effort to manipulate its case on record review. Geer v. FHA, 975 F. Supp. 39, 41 (D. Mass. 1997) (citing <i>Environmental Defense Fund v. Blum</i>, 458 F. Supp. 650, 661 (D.D.C. 1978)).</p> <p>“The agency may not . . . skew the ‘record’ for review in its favor by excluding from that ‘record’ information in its own files which has great pertinence to the proceeding in question.’ <i>Id.</i> . . . Furthermore, if the additional information includes factual or policy information relevant to the agency's decision, then the court may consider it.” Geer v. FHA, 975 F. Supp. 39, 41 (D. Mass. 1997)</p> <p>In order for an agency to withhold a document under the deliberative process privilege “[f]irst, the document must be prepared prior to a final decision in order to assist an agency decisionmaker in arriving at his decision. Second, the document must be ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.’ Furthermore, factual information that may be segregated from the rest of the document is not protected by the privilege.” Geer v. FHA, 975 F. Supp. 39, 44 (D. Mass. 1997) (quoting Town of Norfolk and Walpole v. United States Army Corps of Engineers, 968 F.2d 1438, 1456 (1st Cir. 1992)).</p>

<p>2nd Cir.</p>	<p>“[T]he whole record’ refers to the full record that was before the agency, meaning the agency decision-maker, at the time of the decision.” Comprehensive Cmty. Dev. Corp. v. Sebelius, 890 F. Supp. 2d 305, 308 (S.D.N.Y. 2012).</p> <p>To rebut deference to the agency “a party must show that the materials sought to be added were before the agency <i>decision-maker</i>. It is not enough to show that these materials were somewhere within the agency.” Comprehensive Cmty. Dev. Corp. v. Sebelius, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012).</p> <p>“[T]he weight of authority holds that ‘[a] complete administrative record . . . does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege.’” New York v. Salazar, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) (quoting Tafas v. Dudas, 530 F. Supp.2d 786, 793 (E.D. Virginia 2008)).</p> <p>The privilege extends to documents that are pre-decisional and were part of the deliberative process but does not apply to purely factual matter, and the burden of establishing that a document falls within these parameters and should thus be excluded rests with the government. New York v. Salazar, 701 F. Supp. 2d 224, 237 (N.D.N.Y. 2010).¹</p> <p>Courts may overrule the deliberative process privilege by balancing the interests relative to disclosure.² Citizens Against Casino Gambling v. Stevens, 814 F. Supp. 2d 261, 270 (W.D.N.Y. 2011).</p>
-----------------------------------	--

¹ The court ruled that because “DOI’s decision-making process [was] at the heart of this action, [the court found] that the deliberative process privilege imposes no restriction on plaintiffs’ access to pre-decisional materials, and all documents withheld from the administrative record on this basis must therefore be produced.” [New York v. Salazar](#), 701 F. Supp. 2d 224, 238 (N.D.N.Y. 2010).

² Courts must consider the following interests: “(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.” [Citizens Against Casino Gambling v. Stevens](#), 814 F. Supp. 2d 261, 270 (W.D.N.Y. 2011)

3rd Cir.

Citing to an opinion from the District of Columbia, the court stated “the record ‘before the agency’ includes all documents and materials ‘directly or indirectly’ considered by agency decision-makers. [Del. Dep’t of Nat. Res. & Env’tl. Control v. United States Army Corp of Eng’rs \(USACOE\)](#), 722 F. Supp. 2d 535, 541 (D. Del. 2010) (citing [Pac. Shores Subdivision Cal. Water Dist. v. United States Army Corps of Eng’rs](#), 448 F. Supp. 2d 1, 4 (D.D.C. 2006)).³

“[T]he whole administrative record . . . is not necessarily those documents that the agency has compiled or submitted as ‘the’ administrative record’ . . . Restricting judicial review to whatever documents an agency submits ‘would permit an agency to omit items that undermin[e] its position’ . . . Accordingly, the courts must engage in an appropriate review to ensure that the full and complete administrative record has been submitted.” [Am. Farm Bureau Fedn v. United States Epa, No. 1:11-CV-0067](#), 2011 U.S. Dist. LEXIS 148637, at *9 (M.D. Pa. Dec. 28, 2011).

“[C]ourts have recognized a distinction between a motion to *complete* the administrative record and a motion to *supplement* the administrative record . . . *completion* of the record implies the addition of only those relevant documents that were actually available to, and considered by the agency at the time the decision was made and, therefore, should have been part of the record but were improperly excluded.” [Am. Farm Bureau Fedn v. United States Epa, No. 1:11-CV-0067](#), 2011 U.S. Dist. LEXIS 148637, at *11-12 (M.D. Pa. Dec. 28, 2011).

Courts have looked at three factors when considering whether to permit discovery based on an allegation of an incomplete administrative record: “(1) the clarity of agency procedures that define the scope of an administrative record; (2) an indication that important documents were missing from the record; and (3) the size of the record.”⁴ [Am. Farm Bureau Fedn v. United States Epa, No. 1:11-CV-0067](#), 2011 U.S. Dist. LEXIS 148637, at *30 (M.D. Pa. Dec. 28, 2011).

	<p>“Courts have interpreted the deliberative prong to require that the communication forms ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters’ . . . In other words, purely factual matters remain unprivileged.” Del. Dep't of Nat. Res. & Env'tl. Control v. United States Army Corp of Eng'rs (USACOE), 722 F. Supp. 2d 535, 544 (D. Del. 2010).</p>
--	---

³ See also [Am. Farm Bureau Fedn v. United States Epa, No. 1:11-CV-0067, 2011 U.S. Dist. LEXIS 148637, at *7 \(M.D. Pa. Dec. 28, 2011\)](#) (“The ‘whole record’ consists of materials either directly or indirectly considered by the decision maker.”).

⁴ The court granted plaintiff’s motion to include a report by the Agricultural Nutrient Policy Council, modeling-related emails, and pollutant allocation emails.

<p>4th Cir.</p>	<p>[T]he Court must have before it the record of expert views and opinions, the technological data and other relevant material, including the state hearings, on which the Administrator himself acted.” Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973).</p> <p>“The whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not ‘rely’ on that information in its final decision.” Tafas v. Dudas, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008) (citing <i>Thompson v. United States Dep't of Labor</i>, 885 F.2d 551, 555 (9th Cir. 1989)).</p> <p>A complete administrative record, however, does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege . . . internal memoranda made during the decisional process . . . are never included in a record . . . [b]riefs, and memoranda made by the [agency] or its staff, are not parts of the record.” Tafas v. Dudas, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008).</p> <p>Only the factual portions of internal agency documents must be included in the record, if that factual information is not already in the record. Tafas v. Dudas, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008).</p> <p>When an agency has not submitted all of the materials that properly constitute the complete administrative record a showing of bad faith or improper purpose is not required. Ohio Valley Envtl. Coal. v. Whitman, No. 3:02-0059, 2003 U.S. Dist. LEXIS 148, at *10-11 (S.D. W. Va. Jan. 6, 2003)⁵ (citing <i>Ad Hoc Metals Coalition</i>, 227 F. Supp. 2d at 140 n.5).</p>
-----------------------------------	--

⁵ The court granted the plaintiff’s motion to include public comments in the administrative record but denied inclusion of internal EPA e-mails, reports, memoranda, and guidance documents.

5th Cir.	<p>“[T]he ‘whole record’ is not necessarily those documents that the agency has compiled and submitted as ‘the’ administrative record. Rather, in applying the substantial evidence test, the Court must look to all the evidence that was before the decision-making body.” Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 32-33 (N.D. Tex. 1981).</p> <p>“The ‘whole’ administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981).</p> <p>“[L]imited discovery to complete the record is also proper where the Court determines the agency has failed to file the ‘whole record.’” Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981).</p> <p>“[A] record may be ‘adequate’ because it fully articulates the agency's reasoning, yet at the same time be ‘inadequate’ because it fails to provide the court all documents, memoranda and other evidence which were considered directly or indirectly by the agency.” Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 33 (N.D. Tex. 1981).</p>
----------------------------	---

<p>6th Cir.</p>	<p>The administrative record “‘includes all materials ‘compiled’ by the agency[] that were ‘before the agency at the time the decision was made.’” Sierra Club v. Slater, 120 F.3d 623, 638 (6th Cir. 1997).</p> <p>“The deliberative process privilege shields intra-governmental communications relating to matters of law or policy from disclosure.” GMC v. United States, No. 07-14464, 2009 U.S. Dist. LEXIS 121383, at *13 (E.D. Mich. Dec. 23, 2009).</p> <p>“To come within the deliberative process privilege, a document must be both ‘predecisional,’ meaning it is ‘received by the decision maker on the subject of the decision prior to the time the decision is made,’ and ‘deliberative,’ the result of the consultative process . . . ‘Factual materials are generally not privileged unless they are inextricably intertwined with policy-making processes . . . Non-factual materials that express opinions or recommendations, on the other hand, are clearly protected.’ . . . Draft documents are considered to be predecisional and exempt from disclosure if such material is deliberative in nature.” GMC v. United States, No. 07-14464, 2009 U.S. Dist. LEXIS 121383, at *14 (E.D. Mich. Dec. 23, 2009).</p> <p>“Simply designating a document as a ‘draft’ does not automatically make it privileged under the deliberative process privilege.” GMC v. United States, No. 07-14464, 2009 U.S. Dist. LEXIS 121383, at *21 (E.D. Mich. Dec. 23, 2009).</p>
-----------------------------------	--

<p>7th Cir.</p>	<p>“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.” Miami Nation of Indians of Ind., Inc. v. Babbitt, 979 F. Supp. 771, 775 (N.D. Ind. 1996) (quoting Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993)).</p> <p>“[A] document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record.” Miami Nation of Indians of Ind., Inc. v. Babbitt, 979 F. Supp. 771, 777 (N.D. Ind. 1996) (quoting Clairton Sportsmen's Club v. Pennsylvania Turnpike Commission, 882 F. Supp. 455, 464 (W.D. Pa. 1995)).</p> <p>“If the Department . . . directly or indirectly considered any guidelines, directives, or manuals, those materials should be included in the record.” Miami Nation of Indians of Ind., Inc. v. Babbitt, 979 F. Supp. 771, 777 (N.D. Ind. 1996).</p>
<p>8th Cir.</p>	<p>“The [whole record] rule prevents a party from withholding evidence unfavorable to its case or defending a determination with <i>post-hoc</i> rationalizations.” Gillum v. Commissioner, 676 F.3d 633, 648 (8th Cir. 2012).</p> <p>“[T]he record is the information actually considered by the administrator.” Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs, 124 F. Supp. 3d 958, 964 (D.S.D. 2015).⁶</p>

⁶ The court denied the Plaintiffs’ motion to compel because the documents alleged to be missing from the record did “not necessarily establish clear evidence that the administrative record was improperly compiled.” [Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Eng'rs, 124 F. Supp. 3d 958, 966 \(D.S.D. 2015\)](#).

9th Cir.	<p>“The ‘whole’ administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989).</p> <p>“An agency may not exclude information it considered on the grounds that it did not rely on that information.” Oceana, Inc. v. Pritzker, No. 16-cv-06784-LHK (SVK), 2017 U.S. Dist. LEXIS 96067, at *5 (N.D. Cal. June 21, 2017).</p> <p>“[M]aterial considered, but then discounted or otherwise not relied upon, is part of the record.” Oceana, Inc. v. Pritzker, No. 16-cv-06784-LHK (SVK), 2017 U.S. Dist. LEXIS 96067, at *16 (N.D. Cal. June 21, 2017).</p> <p>Under the deliberative process privilege, an agency “can withhold documents or prevent testimony that ‘reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.’” N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1120-21 (N.D. Cal. 2003).</p>
----------------------------	--

<p>10th Cir.</p>	<p>“The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.” Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993).</p> <p>“The administrative record includes documents beyond those that ‘literally pass[ed] before the eyes of the final agency decisionmaker[s].’” Cherokee Nation v. S.M.R. Jewell, No. 12-CV-493-GKF-TLW, 2013 U.S. Dist. LEXIS 134548, at *8 (N.D. Okla. Sep. 20, 2013).</p> <p>“The administrative record must include not only the documents and materials the agency ultimately credits when reaching its decision, but also those that the agency considered and rejected in reaching its final conclusion.” Cherokee Nation v. S.M.R. Jewell, No. 12-CV-493-GKF-TLW, 2013 U.S. Dist. LEXIS 134548, at *8-9 (N.D. Okla. Sep. 20, 2013).</p> <p>“If the agency decision maker based his decision on the work and recommendations of subordinates, those materials should be included in the record.” Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275 (D. Colo. 2010).</p> <p>“[I]f a party moves to include a study that was cited in the recommendations of subordinates, the party need not show that the decision maker read the study, but the party must show that the study was so heavily relied on in the recommendations that the decision maker constructively considered it.” Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1276 (D. Colo. 2010).</p>
------------------------------------	---

<p>11th Cir.</p>	<p>“The record must contain only ‘documents considered by the staff prior to the agency action.’” Citizens for Smart Growth v. Peters, No. 07-14122-CIV-MARTINEZ-LYNCH, 2008 U.S. Dist. LEXIS 126060, at *6 (S.D. Fla. Sep. 23, 2008).</p> <p>Documents considered directly or indirectly by the agency staff prior to the agency action should be included.⁷ Citizens for Smart Growth v. Peters, No. 07-14122-CIV-MARTINEZ-LYNCH, 2008 U.S. Dist. LEXIS 126060, at *7 (S.D. Fla. Sep. 23, 2008).</p> <p>“Documents and materials indirectly considered by agency decision-makers are those that may not have literally passed before the eyes of the decision-makers, but were ‘so heavily relied on in the recommendation that the decision-maker constructively considered’ them.” Ga. River Network v. United States Army Corps of Eng'rs, No. 4:10-cv-267, 2012 U.S. Dist. LEXIS 37012, at *12 (S.D. Ga. Mar. 19, 2012).</p> <p>An agency “may not skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made.” Ga. Aquarium, Inc. v. Pritzker, 134 F. Supp. 3d 1374, 1378 (N.D. Ga. 2014).</p>
------------------------------------	--

⁷ “The complete administrative record consists of all documents and materials *directly or indirectly* considered by the agency.” [Ga. River Network v. United States Army Corps of Eng'rs, No. 4:10-cv-267, 2012 U.S. Dist. LEXIS 37012, at *11 \(S.D. Ga. Mar. 19, 2012\).](#)

D.C. Cir.	<p>“[A] complete administrative record should include all materials that ‘might have influenced the agency's decision,’ and not merely those on which the agency relied in its final decision.” Amfac Resorts, LLC v. United States DOI, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).</p> <p>“This includes all information that the agency considered either directly or indirectly.” Stand Up for Cal.! v. United States DOI, 315 F. Supp. 3d 289, 293 (D.D.C. 2018).</p> <p>“[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well.” Amfac Resorts, LLC v. United States DOI, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).</p> <p>“[D]eliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record.” Amfac Resorts, LLC v. United States DOI, 143 F. Supp. 2d 7, 12 (D.D.C. 2001).</p>
------------------	---

Agency Guidance Documents

EPA	<p>ENVIRONMENTAL PROTECTION AGENCY, ACTION DEVELOPMENT PROCESS: ADMINISTRATIVE RECORDS GUIDANCE (Sept. 2011), https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf.</p> <ul style="list-style-type: none">- EPA’s stance is that the administrative record does not include materials that solely reflect the internal deliberative processes of decision-making within EPA.- EPA’s guidance states that “the actual subjective motivation of Agency decisionmakers is immaterial as a matter of law.”⁸- Accordingly, “materials containing solely the policy advice, recommendations, or opinions of EPA or other federal government staff that were generated as part of the internal deliberative process for formulating the EPA decision are not generally part of the administrative record.”
------------	---

⁸ The EPA guidance document cites to *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1324-26 (D.C. Cir. 1984). This case was reheard *en banc* by the DC Circuit Court of Appeals. The plurality denied the petitioner’s request to supplement the record, stating that the petitioner must first make a showing of bad faith and improper conduct. However, the concurring opinion states that the court can conduct an *in camera* review “to ensure the sanctity of the administrative process.” [San Luis Obispo Mothers for Peace v. United States NRC](#), 789 F.2d 26, 45 (1986). The concurrence states, the plurality “creates incentives for concealment from the public and reviewing courts by announcing to the agency that any improper actions taken during their proceedings will be unreviewable so long as no tangible evidence of these improper actions escapes from the meeting room.” [San Luis Obispo Mothers for Peace v. United States NRC](#), 789 F.2d 26, 45-46 (1986). Moreover, the initial decision that the EPA relies on does not mention materiality at all. See [Deukmejian v. Nuclear Regulatory Com.](#), 751 F.2d 1287, 1324-26 (1984).

NOAA	<p>DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION GUIDELINES FOR COMPILING AN AGENCY ADMINISTRATIVE RECORD (Dec. 21, 2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf.</p> <ul style="list-style-type: none"> - NOAA’s guidance document tracks with most of the case law. - Quoting Thompson v. United States Dep't of Labor, NOAA’s document states that the administrative record “consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” - The NOAA document continues “[n]either the APA nor any of NOAA's statutes or directives provides any further guidance on the definition of ‘whole record,’ or the specific contents of the Administrative Record.” - The document acknowledges the deliberative process privilege when the documents are both predecisional and deliberative. However, factual or analytical information should be included in the administrative record. - Privilege determinations should be made by the Custodian in consultation with NOAA General Counsel’s Office.
-------------	--

DOI	<p>DEPARTMENT OF INTERIOR, STANDARDIZED GUIDANCE ON COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (June 27, 2006), https://www.fws.gov/policy/e1282fw5.pdf.</p> <ul style="list-style-type: none"> - The DOI guidance document states that “an AR is a compilation of documents that includes the decision-making documents, as well as relevant agency documents generated or received in the course of the decision-making process . . . the AR must demonstrate that the agency considered opposing viewpoints, if any, and provide a thorough explanation as to why the preferred course of action was adopted.” - The document states that the administrative record should include substantive documents “[t]hat were available to the decision-maker at the time the decision was made (i.e., considered by staff involved in the decision process as it proceeded through the agency), regardless of whether they were specifically reviewed by the decision-maker.” - The document advises that judicial review is not based on the internal decision-making process or documents that reflect that process. - “Relevant privileges that may be asserted by the Office of the Solicitor and the Department of Justice include: the attorney-client privilege, the attorney work product privilege, the confidential business information or trade secret privilege, the deliberative process privilege, and the executive and governmental privileges.”⁹
------------	---

⁹ The DOI document instructs Administrative Record Coordinators to consult the Office of the Solicitor due to the number of legal issues associated with asserting privileges.

DOJ	<p>ENV'T & NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, GUIDANCE TO FEDERAL AGENCIES IN COMPILING THE ADMINISTRATIVE RECORD (Jan. 1999), http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.</p> <ul style="list-style-type: none">- The DOJ document tracks with most of the case law.- The document states “[t]he administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency’s decision.”- Regarding deliberative process, the document states “[b]e sensitive to the relevant privileges and prohibitions against disclosure, including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes . . .”- The DOJ document advises agencies to compile an index of privilege materials to reflect that they are being withheld.
------------	--