



**U.S. Department of
Transportation**


Office of the Secretary
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**MEMORANDUM FOR SECRETARIAL OFFICERS AND HEADS OF
OPERATING ADMINISTRATIONS**

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Subject: Guidance on Communication with Parties outside of the Federal Executive Branch (Ex Parte Communications)

Informal communications between agency personnel and individuals outside of the Federal Executive branch have traditionally been an important and valuable aspect of rulemaking, adjudication, and other actions taken by Executive branch agencies (“administrative proceedings”). These informal communications (often referred to as “*ex parte*”) provide a means to engage the public and obtain improved data and information and clarification of views that can assist the agency in making well-informed decisions. However, *ex parte* communications can create the appearance of undue influence that might cause the public to lose trust in the integrity of the decision-making process if the agency receives information in an *ex parte* communication and relies on that information in reaching a decision without disclosing it in the record. Further, the Department must treat parties equitably in administrative proceedings by making every reasonable effort – including affirmative outreach where appropriate – to afford interested parties an equal opportunity to be heard through *ex parte* communications as permitted by the guidelines.

The Office of the General Counsel has developed updated guidance to facilitate appropriate *ex parte* communications. With respect to informal rulemaking, *ex parte* communication procedures apply from initiation of a rulemaking through publication of a final rule, and through disposition of any petition for reconsideration. The minimum process that applies prior to publication of a proposed rule is designed to ensure maximum information gathering. In contrast, with respect to adjudication, *ex parte* communications between an interested individual(s) and agency personnel involved in, or expected to be involved in, the decision are prohibited during the pendency of the adjudication if they relate to the merits of the proceeding such that they affect the way a given case is decided. The guidance also sets forth *ex parte* procedures for the wide variety of other administrative proceedings undertaken by the Department, as well as for public contacts in litigation.

U.S. Department of Transportation/Office of the Secretary
Guidance for *Ex Parte* Communications and Public Communications in Litigation

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I. INTRODUCTION

Informal communications between agency personnel and individuals outside of the Federal Executive branch have traditionally been an important and valuable aspect of rulemaking, adjudication, and other actions taken by Executive branch agencies (referred to herein as “administrative proceedings”). This document provides guidelines for the conduct of these informal communications – commonly referred to as *ex parte* communications – involving all Department of Transportation (DOT or the Department) personnel, both policy officials and career staff. Specifically, the document provides information on when *ex parte* communications are allowed, when they are prohibited, and when DOT personnel should exercise discretion in engaging in *ex parte* communications. The guidelines cover *ex parte* communications that may occur in: (1) rulemaking; (2) adjudications; and (3) other administrative proceedings.¹ This document also provides guidelines for the inclusion of the substance of any *ex parte* communications in the public docket for the applicable agency action. Finally, the guidelines cover communications by DOT personnel related to litigation in which the Department is a party.

The term “*ex parte* communications” is commonly understood to mean: (i) written or oral communications; (ii) regarding the substance of an anticipated or ongoing administrative proceeding; (iii) between the agency and interested persons; and (iv) that are not placed in the docket of the administrative proceeding at the time they occur.² As a baseline matter, the Administrative Procedure Act (APA)³ imposes no restriction on *ex parte* communications in the context of the Department’s typical forms of administrative proceedings, i.e., informal rulemaking or informal adjudication.⁴ The APA, however, prohibits *ex parte* communications in formal adjudications and formal rulemakings conducted under the APA’s trial-like procedures.⁵ *Ex parte* communications in other contexts are also limited.

The Department’s policy is to encourage full public participation in administrative proceedings, primarily through written comment and engagement in public meetings. *Ex parte* communications can also be useful ways to engage the public and obtain improved data and information and clarification of views that can assist the agency in making well-informed decisions. They can also give regulated entities and other interested members of the public additional assurance that their viewpoints have been heard by the Department. *Ex parte* communications, though, can have serious ramifications if the agency receives information in an *ex parte* communication and relies on that information in reaching a decision without disclosing it in the record. A failure to disclose can also create the appearance of undue influence that can

¹ This document is intended for internal Departmental use and is not intended to be cited in any judicial or administrative proceeding. Administration of programs discussed herein is within the sole discretion of DOT.

² With regard to rulemaking, see ACUS Recommendation 2014-4, adopted June 6, 2014, available at [Recommendation 2014-4 \(Ex Parte\) \(acus.gov\)](https://www.acus.gov/recommendation-2014-4-ex-parte). With regard to part (iv) of the definition, DOT clarifies that an *ex parte* communication, as differentiated from a public meeting, is not docketed *at the time it occurs*. The public is not aware that an *ex parte* meeting has occurred until the summary memorandum is placed in the docket. In contrast, a public meeting is docketed at the time it occurs, even if the transcript is placed into the docket at a later time, because the meeting is noticed and any member of the public can participate in real time. DOT further clarifies this definition with regard to rulemaking in section III.

³ 5 U.S.C. 551 et seq.

⁴ See 5 U.S.C. § 553 and 554.

⁵ See 5 U.S.C. § 556 and 557. Note that DOT does not typically use formal rulemaking procedures.

cause the public to lose trust in the integrity of the decision-making process. Further, the Department must treat parties equitably in administrative proceedings by making every reasonable effort to afford interested parties an equal opportunity to be heard through *ex parte* communications. The Department must, therefore, ensure that these contacts are conducted and documented in a way that ensures that all members of the public are given adequate knowledge of and ability to engage in allowable *ex parte* communications in the context of administrative proceedings.

Because of the importance of transparency and impartial decision-making, there are several guiding principles that DOT personnel should keep in mind prior to accepting a meeting or call, or otherwise engaging in conversation, with a party from outside of the Executive branch. DOT personnel should consider what personal involvement or interest the requestor may have in the outcome of any issues or matters pending before the Department. It is important to avoid the appearance of bias and to ensure that the Department does not appear to compromise its impartiality and objectivity. When engaging in *ex parte* communications, DOT personnel shall not: (1) release non-public information to outside parties; (2) give an advantage to one party over another; or (3) prematurely disclose the Department's decisions; and shall: (1) ensure, through appropriate affirmative outreach where necessary, that the opportunity to engage in *ex parte* communications is equitable to all parties, including stakeholders who might otherwise be less represented in DOT rulemakings or other matters; (2) keep a record of all *ex parte* communications; and (3) ensure information about and gained from any *ex parte* communication is included in the docket. (In circumstances where there is no official docket, such as for *ex parte* communications regarding a FOIA request, the communication should be made publicly available through other appropriate means.)

II. EXECUTIVE SUMMARY

As noted in the Introduction, DOT's *ex parte* guidance covers rulemaking (specifically, informal "notice and comment" rulemaking), adjudications, and other administrative proceedings. The guidance contains information on when *ex parte* communications are prohibited and permitted, and when DOT personnel should use caution in engaging in *ex parte* communications. The guidance also contains information on communications with outside parties regarding litigation. This Executive Summary sets forth the basic parameters for the conduct of *ex parte* communications and public communications in litigation. Important additional information and relevant legal authorities are described in the attached guidance.

Informal Rulemaking. DOT personnel are encouraged to have meetings or other contacts with outside parties throughout the rulemaking process, and should ensure, through appropriate affirmative outreach where necessary, that the opportunity to engage in *ex parte* communications is equitable to all parties, including stakeholders who might otherwise be less represented in that process. DOT's *ex parte* guidance applies from initiation of a rulemaking through publication of a final rule, and through disposition of any petition for reconsideration. DOT personnel cannot discuss or negotiate concerning the substance of a rulemaking while engaging in these contacts.

Before publication of a proposed rule, the guidance provides only for very basic information regarding any meeting or other contact with an outside party to be included in the docket. After publication of the proposed rule, memorialization of the meeting is required and should include a summary of the issues discussed in addition to this basic meeting information. The Office of the Secretary (OST) or Operating Administration (OA) may ask the party requesting the *ex parte* communication to submit the memorandum memorializing the communication, or determine that it should prepare the memorandum. This memorandum, as well as the substance of material information submitted by the public as part of an *ex parte* communication (with appropriate protections for confidential information), must be included in the public rulemaking docket so that all interested parties have notice of and an opportunity to comment on the information.

Adjudication. *Ex parte* communications between an interested individual(s) and agency personnel involved in, or expected to be involved in, the decision are prohibited during the pendency of an adjudication if they relate to the merits of the proceeding such that they affect the way a given case is decided. Status reports and general background discussions about an entire industry that do not relate directly to a specific agency adjudication involving a member of that industry are allowed. Care must be taken, however, to ensure that the discussion does not inadvertently touch on topics that may affect the merits of the proceeding.

Other Administrative Proceedings. Other actions covered by the guidance include personnel matters, external civil rights matters (i.e., Title VI, Americans with Disabilities Act (ADA), and Disadvantaged Business Enterprise (DBE) matters), FOIA requests and appeals, NEPA environmental reviews, suspension and debarment actions, and proceedings before the Department's Assistant Secretary for Aviation and International Affairs and the Office of Aviation Consumer Protection. A summary chart is provided immediately below for each of these categories of agency action. Please refer to Section VI of the guidance document for specific procedures and additional information.

**SUMMARY CHART OF EX PARTE COMMUNICATION PROCEDURES
FOR SPECIFIC DOT ADMINISTRATIVE PROCEEDINGS**

Type of administrative proceeding	Prohibited	Allowed
Personnel matters (See Section VI for additional detail regarding the role of DOT counsel.)	1) Communications with the public about a pending personnel action or Equal Employment Opportunity (EEO) matter, including any comments that might verify the existence of a case. 2) Communications with an outside attorney about a pending personnel action or EEO matter, other than by DOT counsel or, where appropriate, an EEO Counselor, investigator, or mediator. 3) Communications in response to media requests, except by Public Affairs after consulting with DOT counsel. 4) Communications with an employee or job applicant about a pending EEO matter initiated against DOT by that employee or job applicant, other than by DOT counsel or, where appropriate, an EEO Counselor, investigator, or mediator.	N/A

Type of administrative proceeding	Prohibited	Allowed
External Civil Rights Matters (i.e., Title VI, ADA, DBE)	<i>Ex parte</i> communications regarding the merits of a complaint that are unrelated to the fact-gathering process of a formal investigation conducted by DOT.	<ol style="list-style-type: none"> 1) Communications with the complainant, respondent, and other relevant parties as part of a DOT-sanctioned investigation to gather facts relevant to a formal complaint. 2) Strictly procedural inquiries, such as status report requests. 3) Communications regarding publicly available resources or guidance materials.
FOIA Requests and Appeals (See Section VI for additional detail regarding the role of DOT FOIA staff.)	<ol style="list-style-type: none"> 1) Communications notifying the FOIA requestor of the outcome of the requestor's appeal before the FOIA appeal determination has been made in writing. 2) Communications with a FOIA requestor about records in a Privacy Act system of records relating to a third person, including the existence of those records, or records not in a Privacy Act system of records that, if disclosed, would result in an unwarranted invasion of an individual's privacy. 3) Communications with a FOIA requestor about information or records that may not be disclosed to the public by law, regulation, or policy. 4) Communications with the requestor relating to the processing of a FOIA request (e.g., fee waivers, expedited requests, status reports, production schedules, etc.), other than by the appropriate DOT FOIA personnel. 	Communications directing a FOIA requestor to publicly available information relevant to the requestor's FOIA request.
NEPA Reviews	N/A	Communications with members of the public both before and after a NEPA decision.

Type of administrative proceeding	Prohibited	Allowed
Suspension/ Debarment Actions – Public	1) Communications about or release of suspension and debarment documents, except pursuant to FOIA or in response to Congressional inquiries. 2) Media requests for suspension and debarment documents, except pursuant to FOIA or by the Public Affairs Office. 3) Communications regarding pending suspension and debarment actions, except pursuant to FOIA, in response to Congressional inquiries, or by the Public Affairs Office.	1) Communications directing members of the public to SAM.gov and FAPIIS. 2) Communications about anything posted on SAM.gov and FAPIIS. 3) Communications directing members of the public to PACER.
Suspension/ Debarment Actions – Respondents	1) Communications with respondents to pending suspension or debarment matters, and their counsel about those pending matters by individuals not responsible for the official communication on that matter. 2) Communications about documents under seal by the courts or the Office of the Inspector General (OIG).	1) Communications with the respondent and the respondent’s attorney if the assigned DOT attorney is also present. 2) Communications by the Suspending and Debarring (SD) Official and other members of the agency’s SD office as needed to administer the suspension and debarment action.
Proceedings Before DOT’s Assistant Secretary for Aviation and International Affairs and the Office of Aviation Consumer Protection	Substantive communications with any outside party, including Members of Congress, or disclosure of any information about a pending aviation economic regulatory proceeding that is not available to the public.	1) Communications <i>received</i> in adjudications arising under the Essential Air Service (EAS) program. 2) Communications with outside persons inquiring about the status of a case or requesting expeditious treatment. 3) Communications with employees of a Federal agency that is not a party to the proceeding and is not acting as a conduit for a private person.

Litigation. DOT personnel should contact DOT counsel before engaging in any litigation-related communications with a party in litigation with the Department (or its attorney), including settlement discussions. DOT counsel will coordinate with the Department of Justice to determine whether and to what extent such communications are appropriate. DOT personnel should not discuss ongoing litigation with the media without first consulting with DOT counsel. DOT personnel should exercise caution in discussing litigation with third-party stakeholders and are strongly encouraged to contact DOT counsel before doing so.

III. EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING

DOT has promulgated regulations addressing *ex parte* communications (also referred to as “public contacts”) in informal rulemaking.⁶ These regulations provide, in part, that:

- (i) DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking⁷ at any stage of the rulemaking process.
- (ii) The substance of material information submitted by the public on which DOT relies in proposing or finalizing the rule must be adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.⁸

DOT’s policies for public contacts during informal rulemaking proceedings are also set forth in DOT Order 2100.6A, Rulemaking and Guidance Procedures. In informal rulemaking, consistent with the definition provided in the Introduction section of this guidance, DOT considers a communication to be *ex parte* when it is a written or oral communication between agency personnel and members of the public regarding the substance of a rulemaking, including communications related to technical or economic matters, and where the communications are not written comments submitted to the rulemaking docket or oral comments made during a public meeting. Note that “the public” includes any non-Federal Executive branch personnel, including members of Congress and their staff, as well as State or local government representatives.

While communications that occur prior to publication of a proposed rule are not, strictly speaking, *ex parte* communications, they are referred to as such and covered in this section, but only very basic information is provided for them and placed in the docket. This is intended to alleviate burden on OST offices and OAs but also to ensure an open, transparent rulemaking process that is equitable to all parties.

a. Prohibited.

There are no explicit prohibitions against *ex parte* communications in informal rulemaking.⁹

b. Allowed, and Applicable Procedures.

Consistent with DOT’s regulations and DOT Order 2100.6A, Rulemaking and Guidance Procedures, this guidance sets forth procedures governing communications, such as meetings, telephone calls, or electronic contact, by non-Executive branch parties with DOT personnel during informal rulemaking. The guidance is designed to encourage public participation in the rulemaking process, while ensuring that such participation is open and transparent.

⁶ 49 CFR § 5.5

⁷ Informal rulemaking is conducted under 5 U.S.C. § 553 and additional procedures as required by law and applicable Executive Orders.

⁸ 49 CFR § 5.5(a)(1).

⁹ See 5 U.S.C. § 553.

DOT applies this guidance to all informal rulemaking proceedings after initiation of a rulemaking has occurred, typically upon approval by the DOT General Counsel of a request for assignment of a Regulation Identifier Number (RIN).¹⁰ Informal rulemaking proceedings include, in addition to typical notice and comment rulemaking, those proceedings involving an interim final rule, direct final rule, or direct final rule with a request for comments.

The guidance applies to a rulemaking proceeding upon receipt of a petition for rulemaking. The guidance also applies through the disposition of any petition for reconsideration of a rule (known by some OAs as an administrative appeal).

For the proceedings specified above, if *ex parte* communications occur between DOT personnel and a party or parties outside the Executive branch, DOT must:

- (A) Act as the receiver of information. DOT personnel shall not engage in negotiation or provide any substantive, non-public information during any *ex parte* communication, including substantive aspects of any forthcoming rulemaking documents. DOT personnel will listen to and may ask clarifying questions of an outside party. DOT personnel may also answer factual questions about public documents, such as the intended meaning of a provision in a proposed rule that has already been published.¹¹
- (B) For communications that occur prior to publication of an NPRM, only the date of the communication, participants, and name of the rulemaking under discussion need be included in the docket. The more detailed discussion of the information provided in these communications is then described in the preamble to the proposed rule. It should include a summary of the issues discussed sufficient to provide an understanding of the key points made and key supporting information or reasoning offered
- (C) For communications that occur after publication of the NPRM, either request from the outside party or prepare a memorandum memorializing the meeting or communication to be placed in the public docket for the rulemaking. In addition to the date of the communication, list of attendees, and name of the rulemaking, the summary should include the issues discussed in sufficient detail to provide an understanding of the key points made and key supporting information or reasoning offered. Any materials provided by the outside parties should be included as attachments to the memorandum.
- (D) Refrain from editing a memorandum submitted by an outside party to memorialize an *ex parte* communication. DOT reserves the right to supplement such memoranda with additional information as necessary or to request that the party making the filing do so (e.g., if DOT believes that important information was omitted or characterized incorrectly).¹²

¹⁰ Where rulemaking is required by statute, Executive Order, or other authority, the rulemaking is initiated for purposes of compliance with these guidelines at the time the requirement is established (e.g., the statute is enacted or Executive Order is issued). A RIN must be obtained prior to the publication of any rulemaking documents, including any preliminary documents such as a request for information, notice of inquiry, or notice of public meeting.

¹¹ 49 CFR § 5.5(a)(2).

¹² 49 CFR § 5.5(a)(1).

(E) Include in the rulemaking docket the memorandum and any documents presented to DOT personnel by the outside party in an *ex parte* communication.¹³ Docketing should be accomplished as soon as possible (within one week of the meeting, if at all possible) to ensure that other interested parties have notice of any *ex parte* meetings and an opportunity to comment on any information submitted during an *ex parte* meeting.

If DOT personnel receive a request for an *ex parte* communication, a suggested response is as follows:

“Thank you for requesting a [meeting/telephone call] with [insert name/office] regarding [insert rulemaking]. The Department encourages interested stakeholders and members of the public to provide DOT with information and data to enhance the quality of its rulemakings. As such, we are happy to have a [meeting/telephone call]. To ensure transparency and adequate public notice during the rulemaking process, DOT has published procedures governing the conduct of any *ex parte* communication with DOT personnel, including a requirement that any *ex parte* communication be memorialized and included in the publicly available rulemaking docket. Please refer to DOT’s *ex parte* communication procedures, available at [\[INSERT WEBLINK\]](#), in advance of any [meeting/telephone call]. These procedures set forth the ground rules for *ex parte* communications with DOT. Importantly, the Department will request you provide a memorandum after the [meeting/telephone call] describing the points that you made and listing those in attendance. The Department will be in a listening mode and cannot discuss or negotiate regarding the substance of a particular rulemaking. Please also note that if DOT receives additional data, information, or other materials during an *ex parte* communication, DOT will include that information in the docket and determine whether it is appropriate to seek public comment on the information, so that the Department can appropriately cite to or rely on the information in the rulemaking.”

c. Use Discretion.

If *ex parte* communications occur with an outside party while the rulemaking is pending, DOT personnel will make every reasonable effort to meet with any other outside party who requests a similar opportunity.¹⁴ DOT personnel should ensure, through appropriate affirmative outreach where necessary, that the opportunity to engage in *ex parte* communications is equitable to all parties, including stakeholders who might otherwise be less represented in DOT’s rulemaking process.¹⁵

¹³ DOT must advise outside parties that if they do not want their documents in the rulemaking docket, they should not provide the documents to or leave the documents with DOT personnel. Interested parties may, however, submit documents under a request for confidential treatment. A public version of documents subject to a request for confidential treatment must be provided for the docket so that DOT may rely on the information in reaching a decision in a rulemaking proceeding. DOT will determine whether documents should be released in response to a request for the documents under FOIA. DOT’s FOIA regulations can be found at 49 CFR Subtitle A, Part 7.

¹⁴ 49 CFR 5.5(a)(4).

¹⁵ See DOT Order 2100.6A.

DOT receipt of multiple requests for *ex parte* meetings may indicate that additional public engagement is necessary. In such circumstances, DOT should consider holding a public meeting or extending or re-opening the public comment period, which may include issuing a notice to permit the submission of “reply comments,” i.e., comments providing information in response to the initial public comments received.¹⁶

If new data is obtained from such communications after issuance of the notice of proposed rulemaking, especially after close of the comment period, it may be necessary to seek public comment on the data for DOT to rely on the data in issuance of a final rule.¹⁷

This guidance ceases to apply upon publication in the *Federal Register* of a final rule in a rulemaking proceeding. If the final rule is subject to a petition for reconsideration process, however, this guidance on *ex parte* communications will continue to apply through final disposition, whether grant or denial, of any petition for reconsideration. DOT personnel should therefore docket any *ex parte* communications concerning the substance of a rulemaking for which a petition for reconsideration is received, including those that occurred between publication of the final rule and receipt of the petition.

DOT personnel must ensure that they comply with the Federal Advisory Committee Act (FACA)¹⁸ in conducting any *ex parte* communications. The FACA requires certain interactions between Federal executive agencies and third parties to comply with various transparency and other requirements. Specifically, FACA applies when DOT establishes, manages, or controls groups that include non-Federal government third parties, if DOT personnel seek consensus policy advice or recommendation from those groups. FACA does not apply when DOT personnel participate in one-on-one discussions with external parties, or when DOT personnel seek individual perspectives from external parties rather than seeking consensus advice or recommendations from a group.¹⁹ In any meetings between DOT personnel and two or more third parties (or one party that may represent other parties, such as an industry trade group), DOT personnel must not task, or give the appearance of tasking, those parties with providing consensus advice or recommendations.

Note on discussions with DOT contractors: Discussions between DOT personnel and consultants engaged by the Department to assist with a rulemaking are not considered to be *ex parte* communications. For purposes of this policy, DOT consultants are considered agency employees under 5 U.S.C. 557(d)(1).²⁰ DOT may use consultants, for example, to facilitate negotiated rulemakings.²¹

¹⁶ 49 CFR 5.5(a)(3).

¹⁷ 49 CFR 5.5(a)(5).

¹⁸ 5 U.S.C. App. 2.

¹⁹ See 41 C.F.R. § 102-3.40(e).

²⁰ See Continental-Western Merger, Consultant’s Analysis, 79-6-43, CAB Adv Dig (June 1979) (explaining that a consulting firm is not a person outside the agency, and that the legislative history states that a consultant advising an agency must be considered an “employee” for purposes of 5 U.S.C. § 557(d)). DOT offices use general contractor support in administrative proceedings.

²¹ See, e.g., [Facilitator | US Department of Transportation](#).

Note on meetings held by OIRA for DOT rulemakings under OIRA review: Executive Orders (EO) 12866 and 13563 contain procedures for review of significant regulations by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget, which include a process for members of the public to request meetings with OIRA regarding rules under OIRA review.²² Per EO 12866, OIRA invites DOT to attend these meetings when a DOT rulemaking under OIRA review is the subject of the meeting. These meetings are listening sessions. Any DOT personnel who attend such meetings will not debate points of a rulemaking or otherwise disclose the substance of a rulemaking that has not yet been released to the public, but can answer questions of fact. Because these meetings are subject to disclosure obligations imposed by EO 12866 on OIRA, such meetings are not subject to this policy on *ex parte* communications. However, if the party meeting with OIRA provides information at the meeting that is not already in the rulemaking docket, the DOT personnel who attend the meeting will place a memorandum in the rulemaking docket disclosing such information.

²² EO 12866, Sec. 6(b)(4).

IV. EX PARTE COMMUNICATIONS IN ADMINISTRATIVE ADJUDICATION

Section 557(d)(1) of the APA governs *ex parte* communications in connection with administrative adjudicative proceedings required to be heard on the record, such as certain proceedings before Administrative Judges and Administrative Law Judges.

(a) Prohibited.

The following communications are prohibited:

- *Ex parte* communications under 5 U.S.C. § 557(d)(1): (1) if they are made by an interested individual to agency personnel involved in, or expected to be involved in, the decisional process—or vice versa; and (2) if they relate to the merits of the proceeding such that they affect the way a given case is decided.²³
- Advice by agency personnel representing an agency under 5 U.S.C. § 554(d): An employee or agent engaged in the performance of investigative or prosecuting functions for an agency, as well as their managers or supervisors, in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

(b) Allowed.

The following communications are allowed under 5 U.S.C. § 557(d)(1):

- Procedural inquiries, such as requests for status reports, that will not affect the way the case is decided;²⁴
- General background discussions about an entire industry that do not directly relate to a specific agency adjudication involving a member of that industry;²⁵ and
- Discussions with consultants engaged by the Department. DOT consultants are considered agency employees under Section 557(d)(1).²⁶

²³ 5 U.S.C. § 557(d)(1); *See Prof'l Air Traffic Controllers Org. v. FLRA*, 658 F.2d 547, 562 (D.C. Cir. 1982) (explaining that an interested individual is broadly defined as any individual or other person with an interest in the agency proceeding that is greater than the general interest that the public may have as a whole); see also 5 U.S.C. § 557(d)(1)(A) & (B) (prohibiting certain contacts with “agency personnel,” including “a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process”).

²⁴ H.R. Rep. No. 94-880 (II), at 20 (1976), reprinted in 1976 U.S.C.C.A.N. 2212, 2229; see *Raz Inland Navigation Co., Inc. v. ICC*, 625 F.2d 258 (9th Cir. 1993) (holding that “[t]he challenged contact amounts to no more than a discussion of the status of the proceedings and it is clear that Congress intended to exempt such discussions from the prohibition on *ex parte* communications”).

²⁵ H.R. Rep. No. 94-880 (11), at 20 (1976), reprinted in 1976 U.S.C.C.A.N. 2212, 2229.

²⁶ *See* fn.20. DOT offices may use general contractor support in administrative proceedings.

Note that an agency does not engage in an *ex parte* communication when an interested individual merely submits information to agency personnel.²⁷ The agency, however, must include the information in the docket for the action unless it is deemed inconsequential.²⁸

(c) Use Discretion.

Agency personnel must proceed with caution when dealing with requests for status reports or background discussions that in effect amount to indirect or subtle efforts to influence the substantive outcome of the proceedings.²⁹ The question to ask is: Does this particular communication affect or could it affect the agency's decision on the merits? In doubtful cases, agency personnel should treat the communication as *ex parte* to protect the integrity of the decision-making process.³⁰

²⁷ See *Century Fed, Inc. v. FCC*, 846 F.2d 1479, 1482 (D.C. Cir. 1988) (holding that the existence of letters written to an agency in support of an applicant for a construction permit raises, at most, an inconsequential *ex parte* question).

²⁸ See *id.*

²⁹ H.R. Rep. No. 94-880 (II), at 20 (1976), reprinted in 1976 U.S.C.C.A.N. 2212, 2229.

³⁰ *Id.* Note also that because DOT adjudicators may apply additional *ex parte* procedures in proceedings they administer, DOT counsel should consult with the adjudicator to ensure compliance with any such procedures.

V. **EX PARTE COMMUNICATIONS IN OTHER ADMINISTRATIVE PROCEEDINGS**

A. **Personnel Matters**

(a) **Prohibited:**

Pursuant to the Privacy Act of 1974, 5 U.S.C. §552a and other laws, rules, and regulations, the following public contacts are prohibited:

- Communications with the public about a pending personnel action or Equal Employment Opportunity (EEO) matter, including any comments that might verify the existence of a case.
- Communications with an outside attorney about a pending personnel action or EEO matter, other than communications by DOT counsel, or, where appropriate, an EEO Counselor, investigator, or mediator. If an outside attorney contacts DOT personnel other than investigative personnel or DOT counsel, refer the attorney to DOT counsel.
- Communications in response to media requests. All requests from media must go to the appropriate Public Affairs Office, which may respond after consulting with DOT counsel.
- Communications with an employee or job applicant about a pending EEO matter initiated against DOT by that employee or job applicant. These communications should be referred to DOT counsel, or, where appropriate, an EEO Counselor, investigator, or mediator.

B. **External Civil Rights Matters (e.g., Title VI, Americans with Disabilities Act (ADA))**

(a) **Prohibited.**

The following public contacts are prohibited:

- *Ex parte* communications with the media or members of the public regarding the merits of a complaint that are unrelated to the fact-gathering process of a formal investigation conducted by DOT.

(b) **Allowed.**

The following public contacts are allowed:

- Communications with the complainant, respondent (including voluntary resolution discussions), potential witnesses, and other relevant stakeholders as part of a DOT-sanctioned investigation to gather facts relevant to a formal complaint.
- Procedural inquiries, such as requests for status reports, that will not affect the way the case is decided.
- Communications regarding publicly available resources or guidance materials, such as DOT Questions and Answers, policy memos, or Orders.

C. FOIA Requests and Appeals

This guidance applies to FOIA requests that DOT is processing for an initial determination or an administrative appeal determination. If litigation is pending, the guidance under "Litigation" applies.

(a) Prohibited.

The following public contacts are prohibited:

- Communications notifying the FOIA requestor of the outcome of his appeal before the FOIA appeal determination has been made in writing.³¹
- Communications with a FOIA requestor about records in a Privacy Act system of records relating to a third person,³² including the existence of those records. Communications with a FOIA requestor about records not in a Privacy Act system of records that, if disclosed, would result in an unwarranted invasion of an individual's privacy.³³ These discussions should be referred to the appropriate DOT FOIA or Privacy Officer.
- Communications with a FOIA requestor about information or records that may not be disclosed to the public by law, regulation, or government-wide policy, such as Sensitive Security Information, or confidential business information/trade secrets. These discussions should be referred to the appropriate DOT FOIA Office or FOIA Public Liaison.
- Communications with the requestor relating to the processing of a FOIA request (e.g., fee waivers, expedited requests, status reports, production schedules, etc.) by DOT personnel not responsible for the official communication on that matter. These inquiries should be referred to the appropriate DOT FOIA Office or office processing the request, the FOIA Public Liaison, or DOT counsel's office.

(b) Allowed.

The following public contacts are allowed:

- Communications directing a FOIA requestor to publicly available information relevant to the requestor's FOIA request.

³¹ See 5 U.S.C. § 552(a)(6)(A)(ii). The FOIA has a "constructive exhaustion" provision. See 5 U.S.C. § 552(a)(6)(C). An administrative appeal decision upholding an agency's adverse determination must inform the FOIA requestor of the provisions for judicial review of that determination in the Federal courts. 5 U.S.C. § 552(a)(6)(A)(ii). A FOIA appeal determination letter constitutes a final agency action reviewable in the U.S. District Courts. See 5 U.S.C. § 552(a)(6)(A)(ii).

³² Privacy Act of 1974, 5 U.S.C. § 552a; 49 CFR Part 10. The Privacy Act of 1974 protects from disclosure any information about an individual contained in a "system of records," i.e., a file system (paper or electronic) in which information is retrieved by the name or personal identifier assigned to the individual about whom the information pertains.

³³ 5 U.S.C. § 552(b)(6).

(c) Use Discretion.

- DOT personnel should avoid communicating with a FOIA requestor about the outcome of the requestor’s FOIA request before the initial determination has been made. In very limited circumstances such conversations may be appropriate, but only in coordination and consultation with the appropriate FOIA Office or legal counsel.
- DOT personnel should also seek to avoid communications with a FOIA requestor, or the requestor’s attorney if represented, if the FOIA requestor or attorney is attempting to persuade the Department to release certain records. Requests for such discussions should be referred to the appropriate FOIA Office.

D. NEPA - Environmental Reviews

DOT personnel must be mindful that NEPA decisions are made based on a public comment process and an administrative record.³⁴ Further, NEPA requires agencies to communicate with both the project sponsor or applicant and identify any cooperating agencies participating in the NEPA process.³⁵ Specifically, DOT personnel should anticipate communications with the project sponsor or applicant (and the applicant’s consultants) throughout the environmental review process regarding, for example, studies related to the project or other information that may be required for later Federal action.³⁶ Additionally, when DOT is the lead agency in the NEPA review, it should request the involvement of any cooperating or participating agencies at the earliest practicable time and DOT personnel should, when applicable, communicate with such agencies regarding the proposed project and required environmental documents.³⁷ For NEPA reviews in which DOT is a cooperating agency, DOT personnel should anticipate participating with both the lead and other cooperating agencies in the environmental review process.

The following guidance focuses on considerations of which DOT personnel must be aware if they accept a communication, such as a phone call or a meeting with a member of the public, including the project sponsor or applicant, during or after the NEPA decision-making process. There are more considerations to be aware of if counsel is present for the other side. Thus, in the event counsel will be present for the other side, DOT personnel should contact DOT counsel for further guidance. If litigation is pending, the guidance under “Litigation” would apply.

(a) Prohibited.

NEPA does not explicitly prohibit any *ex parte* communication before the NEPA process has commenced, during the NEPA process, or after a NEPA decision. Indeed, extensive public involvement is mandated for projects not categorically excluded from NEPA. Outside of the

³⁴ See 40 CFR 1503.1(a)(4) (inviting public comments); 40 CFR 1505.2 (requiring agencies prepare a record of decision).

³⁵ See 40 CFR 1501.8.

³⁶ See 40 CFR 1501.2(b).

³⁷ See 40 CFR 1501.8. (Note that while communications with other Federal agencies would not be considered *ex parte*, such communications would still need to be memorialized, as appropriate, for the decision-making record.)

formal public involvement processes provided, however, discretion is advised. See paragraph (c).

(b) Allowed.

The following public contacts are allowed:

- Communications with members of the public, including the project sponsor or applicant and consultants engaged by the project sponsor or applicant, both before and after a NEPA decision has been made.³⁸

(c) Use Discretion.

- DOT personnel should be careful not to create any expectations while meeting or communicating with public contacts, including the project sponsor or applicant, before, during or after the NEPA decision-making process. This is especially important at the pre-decisional stage, where matters even indirectly considered by the decisionmaker would need to be documented in the administrative record should the project decision be challenged in court. Elected officials, special interest groups, impacted businesses, landowners, and participants in the procurement process are examples of public contacts with whom an *ex parte* communication during the NEPA process could be perceived to undermine the integrity of the Department.
- If a communication such as a phone call, meeting or electronic communication with a member of the public, including the project sponsor or applicant, takes place before the NEPA decision has been made, DOT personnel should strategically think about the following: when to have the contact, how to have the contact, why to have the contact, what the scope of the discussion should be, whether other interested persons have an opportunity to provide input, and whether the contact should be documented and made public. The communication needs to be structured thoughtfully to be consistent with the NEPA decision-making process.
- DOT personnel should provide the appropriate NEPA office with information about any public contacts that take place during the NEPA decision-making process. The NEPA office should include the public contact in the project file and determine whether it becomes part of the administrative record.³⁹ In determining whether the public contact becomes part of the administrative record, DOT personnel should consider factors such as whether the contact involves a comment that relates to alternatives to the proposed project, information or analysis regarding the proposed project, or objections to the proposed project.⁴⁰
- If a phone call or a meeting takes place with a member of the public, including the project sponsor or applicant, after the NEPA decision has been made, DOT personnel should remember that the Department has a continuing obligation to make sure a NEPA decision remains valid for any remaining Federal action, such as authorization of funds.⁴¹ There is

³⁸ See 40 CFR 1506.6; see, e.g., 23 CFR 771.111(a)(l) & (h)(2)(ii).

³⁹ 40 CFR 1505.2.

⁴⁰ See *id.*

⁴¹ See 23 CFR 771.129-.130.

a possibility that post-decisional meetings might affect this obligation, such as when new information triggers the requirement for supplemental NEPA evaluation.⁴² DOT personnel should, therefore, provide the appropriate NEPA office with information about any public contacts that take place after a NEPA decision has been made.⁴³

E. Suspension and Debarment Actions

This section is divided into two separate categories: (1) communications with members of the public; and (2) communications with respondents, who are the individuals and/or companies that the Department is suspending and proposing for debarment.

I. Communications with members of the public.

a. Prohibited.

The following communications are prohibited:

- *Communications about or release of suspension and debarment documents.* Absent special circumstances, members of the public must use the FOIA process to obtain suspension and debarment documents, including settlement agreements.⁴⁴ Note that, for purposes of this bullet, the attorney assigned to a suspension or debarment action may disclose, or authorize the disclosure of, documents to the OIG, OST or any other component or agency of the United States Department of Transportation; DOJ, including the United States Attorney's Offices, or any other Federal agency with an interest in the suspension or debarment action; State and local law enforcement agencies; and State, local or other transportation recipients that are affected by a suspension or debarment action. Also, agency counsel may disclose, or authorize the disclosure of, documents to respondents to the relevant suspension or debarment action and their counsel.
- *Media requests for suspension and debarment documents.* All requests by media must go to the Public Affairs Office and be handled through the FOIA process.
- *Communications regarding pending suspension and debarment actions.* DOT personnel, other than the attorney (and, if applicable, program analyst) assigned to a suspension and debarment action, must not discuss any pending suspension or debarment action with members of the public, except as permitted by FOIA or other applicable statute. Additionally, DOT personnel must not discuss a pending suspension and debarment action with any DOT component or agency (including OIG), DOJ or any other Federal agency, State or local law enforcement entities and grant recipients, except as may be authorized by the attorney assigned to the suspension or debarment action.

b. Allowed.

The following public contacts are allowed:

⁴² 40 CFR 1502.9(c).

⁴³ *See id.*

⁴⁴ 5 U.S.C. § 552.

- Communications directing members of the public to SAM.gov (the Federal government's System for Award Management website) or FAPIIS (the Federal Awardee Performance and Integrity Information System for listing administrative agreements as required by Congress), which contains publicly available information.⁴⁵
- Communications about anything posted on SAM.gov or FAPIIS, as it contains publicly available information.⁴⁶
- Communications directing members of the public to PACER, which contains publicly available information, including documents that form the basis for a suspension and debarment action, such as settlements, convictions, deferred prosecution agreements, and civil settlements.⁴⁷

II. Communications with Respondents.

a. Prohibited.

The following communications with members of the public are prohibited:

- Communications with respondents to pending suspension or debarment matters, and their counsel, except through the attorney assigned to the pending suspension or debarment matter and such communications by the Suspending and Debarring Official or assigned agency suspension and debarment staff as needed to administer the suspension and debarment action.⁴⁸
- Communications about documents that are under seal by the courts or the OIG must not be disclosed.

b. Allowed.

The following communications with respondents are allowed:

- Communications with the respondent and the respondent's attorney if DOT counsel assigned to the pending suspension or debarment matter is present, and such communications by the Suspending and Debarring Official or assigned agency suspension and debarment staff as needed to administer the suspension and debarment action.⁴⁹
- Settlement discussions with the respondent and the respondent's attorney through the DOT attorney assigned to the pending suspension or debarment matter.⁵⁰

⁴⁵ See <https://www.sam.gov/portal/public/SAM/#1>.

⁴⁶ *Id.*

⁴⁷ See 2 CFR 180.500-180.530; see also <http://www.pacer.gov/>.

⁴⁸ See MODEL RULES OF PROF'L CONDUCT R. 4.2

⁴⁹ 2 CFR 180.720 & 180.815.

⁵⁰ 2 CFR 180.635.

F. Proceedings Before the Department's Assistant Secretary for Aviation and International Affairs and the Office of Aviation Consumer Protection

Most aviation economic proceedings before the Assistant Secretary for Aviation and International Affairs (e.g., requests for antitrust immunity, codeshare authorization, or air carrier licensing related proceedings) are adjudicatory proceedings, in which the Department determines the rights and responsibilities of individual parties in the circumstances under consideration. The Department collects information by means of applications, pleadings, exhibits, and other written submissions to a public docket. Similarly, the Office of Aviation Consumer Protection, within the Office of the General Counsel, may commence a proceeding to enforce aviation consumer or other laws by opening a docket and posting the complaint.⁵¹ Any person may also make a formal complaint to the Office of Aviation Consumer Protection about any violation of these laws.⁵²

The Department's *ex parte* rules for these proceedings generally bar DOT personnel who may have a role in the decision-making process from communicating off the record with outside persons about the merits of the proceeding while it is pending.⁵³

(a) Prohibited.

Under these *ex parte* rules, from the time that an "identifiable written opposition" is filed in response to an application, complaint, pleading, or show-cause order, until the time that the Department issues its final decision, Departmental personnel may not communicate with persons outside the Department, orally or in writing, about the merits of the proceeding. Thus, the following public contacts are prohibited:

- Substantive communications with any outside party, including Members of Congress, or disclosure of any information about a pending aviation economic regulatory proceeding that is not available to the public.

Any written *ex parte* communication must be placed in the docket. Any oral *ex parte* communication must be summarized in writing, and the summary must be placed in the docket promptly, preferably within seven business days of the discussion. *Ex parte* communications do not become part of the record in the proceeding, and the Department may not consider them in reaching its disposition.

(b) Allowed.

- Communications in adjudications arising under the Essential Air Service (EAS) program.⁵⁴ *Ex parte* communications with outside parties, including Members of Congress, are permitted in adjudications arising under the EAS program. Note that while DOT personnel can receive an *ex parte* communication in an EAS case, DOT personnel

⁵¹ 14 CFR 302.407.

⁵² 14 CFR 302.404.

⁵³ 14 CFR part 300.

⁵⁴ 14 CFR 300.2(c)(8).

cannot disclose substantive, confidential, or internal agency considerations to the person making the *ex parte* communication. DOT personnel can disclose factual matters related to the proceeding, such as when a filing or response is due. Discussing the merits or what the agency is considering and why, however, or disclosing anything not in the public record, is prohibited. An appropriate response to any questions of this nature might be that the decisionmaker will give the matter due consideration, based on the record and the statutes and regulations that govern the EAS program.

- Communications with outside persons inquiring about the status of a case or requesting expeditious treatment. If, however, a decision-maker in any type of adjudicatory proceeding informs someone outside of the Department of the case's status, that official must file a written memorandum describing the exchange in the docket.
- Communications with employees of a Federal agency that is not a party to the proceeding and is not acting as a conduit for a private person.

(c) Use discretion:

- The Department's *ex parte* rules do not prohibit certain communications concerning national defense and foreign policy, including international aviation matters. DOT personnel should seek guidance from the Office of the General Counsel before discussing national defense and foreign policy matters, including those related to international aviation, that may arise in aviation economic proceedings.

VI. PUBLIC COMMUNICATIONS IN LITIGATION

This section provides guidance on dealing with public contacts in litigation.

(a) Prohibited.

The following communications are prohibited:

- Communications with a party (or their attorney) who is in litigation with the Department on matters related to the pending litigation, unless the communication is coordinated with DOT counsel representing the Department. Because it is essential that the Department speak with one voice in litigation, DOT personnel should contact DOT counsel before having any litigation-related communications with an opposing party or its attorneys (including any communications related to potential settlement). DOT counsel will work with Department of Justice attorneys representing the Department to determine whether and to what extent such communications are appropriate.
- Communications with the media related to litigation in which the Department is a party, unless the communication is coordinated with DOT counsel representing the Department. The Department's general policy is to decline to comment on pending litigation.

(b) Allowed.

The following communications are allowed:

- Communications with a party who is in litigation with the Department on matters unrelated to the pending litigation. These communications may occur without a DOT or DOJ attorney present. If the communications are by senior DOT personnel, DOT counsel should be advised of the communications in advance, if practicable.

(c) Use Discretion

- DOT personnel should have a DOT attorney present if they are communicating with a party in litigation with the Department when the communication could include matters related to the pending litigation.
- DOT personnel should exercise caution in discussing litigation with third party stakeholders and are strongly encouraged to contact DOT or DOJ counsel before having any such discussions. DOT personnel shall not reveal any non-public information related to litigation, including DOT's strategy, potential legal arguments, or evaluation of cases.