§ 806.31 Requirements of 5 U.S.C. 552(b)(4) to submitters of non-government contract-related information.

(a) The FOIA requires federal agencies to provide their records, except those specifically exempted, for the public to inspect and copy. Section (b) of the Act lists nine exemptions that are the only basis for withholding records from the public.

(b) In this case, the fourth exemption, 5 U.S.C. 552(b)(4), may apply to records or information the Air Force maintains. Under this exemption, agencies must withhold trade secrets and commercial or financial information they obtained from a person or organization outside the government that is privileged or confidential. This generally includes information provided and received during the contracting process with the understanding that the Air Force will keep it privileged or confidential.

(c) Commercial or financial matter is “confidential” and exempt if its release will probably:

1. Impair the government’s ability to obtain necessary information in the future.
2. Substantially harm the source’s competitive position or impair some other legitimate government interest such as compliance and program effectiveness.

(d) Applicability of exemption. The exemption may be used to protect information provided by a nongovernment submitter when public disclosure will probably cause substantial harm to its competitive position. Examples of information that may qualify for this exemption include:

1. Commercial or financial information received in confidence with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data.

NOTE: Certain proprietary and source selection information may also fall under exemption (b)(3), under the provisions of 10 U.S.C. 2305(g) or 41 U.S.C. 423, if statutory requirements are met.

2. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, offered and received in confidence from a contractor or potential contractor.

3. Personal statements given during inspections, investigations, or audits, received and kept in confidence because they reveal trade secrets or commercial or financial information, normally considered confidential or privileged.

4. Financial data that private employers give in confidence for local wage surveys used to set and adjust pay schedules for the prevailing wage rate of DoD employees.

5. Information about scientific and manufacturing processes or developments that is technical or scientific or other information submitted with a research grant application, or with a report while research is in progress.

6. Technical or scientific data a contractor or subcontractor develops entirely at private expense, and technical or scientific data developed partly with Federal funds and partly with private funds, in which the contractor or subcontractor retains legitimate proprietary interests per 10 U.S.C. 2320 to 2321 and 48 CFR, Chapter 2, 227.71–227.72.

7. Computer software copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would adversely impact its potential market value.

(e) Submitter’s Written Response. If release of the requested material would prejudice your commercial interests, give detailed written reasons that identify the specific information and the competitive harm public release will cause to you, your organization, or your business. The act requires the Air Force to provide any reasonably segregable part of a record after deleting exempt portions. If deleting key words or phrases would adequately protect your interests, advise us in writing which portions you believe we can safely release, and which portions you believe we need to withhold from release. If you do not provide details on the probability of substantial harm to your competitive position or other commercial interests, which would be caused by releasing your material to the requester, we may be required to release the information. Records qualify for protection on a case by case basis.
(f) Pricing Information. Generally, the prices a contractor charges the government for goods or services would be released under the FOIA. Examples of releasable data include: bids submitted in response to an invitation for bids (IFB), amounts actually paid by the government under a contract, and line item prices, contract award price, and modifications to a contract. Unit prices contained in a contract award are considered releasable as part of the post award notification procedure prescribed by 48 CFR 15.503, unless they are part of an unsuccessful proposal, then 10 U.S.C. 2305(g) protects everything including unit price.

APPENDIX A TO PART 806—REFERENCES

Title 5, United States Code, Section 552, The Freedom of Information Act, as amended
Title 5, United States Code, Section 552a, The Privacy Act (as amended)
Title 10, United States Code, Section 2305(g), Prohibition on Release of Contractor Proposals
Title 48, Code of Federal Regulations (CFR), Federal Acquisition Regulations (FAR) System
OMB Bulletin 95–01, 7 December 1994
OMB Memorandum, 6 February 1998
AFI 16–701, Special Access Programs
AFI 31–206, Security Police Investigations
AFI 31–401, Information Security Program Management
AFI 31–501, Personnel Security Program Management
AFI 31–601, Industrial Security Program Management
AFI 33–129, Transmission of Information Via the Internet
AFI 36–2603, Air Force Board for Correction of Military Records
AFI 36–2706, Military Equal Opportunity and Treatment Program
AFI 36–2906, Personal Financial Responsibility
AFI 36–2907, Unfavorable Information File (UIF) Program
AFPD 37–1, Air Force Information Management (will convert to AFPD 33–3)
AFPI 37–124, The Information Collections and Reports Management Program; Controlling Internal, Public, and Interagency Air Force Information Collections (will convert to AFI 33–324)
AFI 37–132, Air Force Privacy Act Program (will convert to AFI 33–332)
AFMAN 37–139, Records Disposition Schedule (will convert to AFMAN 33–339)