

§ 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
 DoD 5200.1-R, Information Security Program, January 1997
 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 35-205, Air Force Security and Policy Review Program
 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)
 AFI 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)

AFI 40-301, Family Advocacy
 AFI 41-210, Patient Administration Functions
 AFI 44-109, Mental Health and Military Law
 AFI 51-201, Administration of Military Justice
 AFI 51-301, Civil Litigation
 AFI 51-303, Intellectual Property-Patents, Patent Related Matters, Trademarks, and Copyrights
 AFI 51-501, Tort Claims
 AFI 51-503, Aircraft, Missile, Nuclear and Space Accident Investigations
 AFI 51-504, Legal Assistance, Notary and Preventive Law Programs
 AFI 51-1102, Cooperation with the Office of the Special Counsel
 AFI 61-204, Disseminating Scientific and Technical Information
 AFI 61-303, Licensing Inventions Made Under Cooperative Research and Development Agreements
 AFI 65-401, Relations With the General Accounting Office
 AFI 71-101, Volume 1, Criminal Investigations
 AFI 71-101, Volume 2, Protective Service Matters
 AFI 84-101, Historical Products, Services, and Requirements
 AFI 90-301, Inspector General Complaints
 AFI 90-401, Air Force Relations With Congress
 AFI 91-204, Safety Investigations and Reports

APPENDIX B TO PART 806—
 ABBREVIATIONS AND ACRONYMS

AFCA—Air Force Communications Agency
 AFCIC—Air Force Communications and Information Center
 AFRC—Air Force Reserve Command
 AFI—Air Force Instruction
 AFLSA/JACL—Air Force Legal Services Agency, General Litigation Division
 AFMAN—Air Force Manual
 AFPC/MSIMD—Air Force Personnel Center/Records Management, FOIA, and Privacy Act Office
 AFPD—Air Force Policy Directive
 ANG—Air National Guard
 ASCII—American Standard Code for Information Interchange
 CFR—Code of Federal Regulations
 DFAS—Defense Finance and Accounting Service
 DFOISR—Director, Freedom of Information and Security Review
 DoD—Department of Defense
 DRU—Direct Reporting Unit
 EFOIA—Electronic Freedom of Information Act
 ERR—Electronic Reading Room
 FOA—Field Operating Agency
 FOIA—Freedom of Information Act
 FOUO—For Official Use Only