

Department of Veterans Affairs

§ 1.558

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part.

[76 FR 51894, Aug. 19, 2011]

§ 1.558 Business information.

(a) *General.* Business information received by VA from a submitter will be considered under the FOIA pursuant to this section and in accordance with the requirements set forth in § 1.557 of this part.

(b) *Designation of business information.* The submitter of business information may designate that specific records or portions of records submitted are business information, at the time of submission or within a reasonable time thereafter. The submitter must use good faith efforts in designating records that the submitter claims could be expected to cause substantial competitive harm and thus warrant protection under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). The submitter may mark the record submission as confidential or use the words “business information” or describe the specific records that contain business information. Such designation will be considered, but will not control, the FOIA Officer’s decision on disclosing the material. A designation will remain in effect for a period of not more than 10 years after receipt by VA, unless the submitter provides acceptable justification for a longer period. The submitter may designate a shorter period by including an expiration date.

(c) *Notices to submitters.* (1) The FOIA Officer shall promptly notify the submitter in writing of a FOIA request seeking the submitter’s business information whenever the FOIA Officer has reason to believe that the information may be protected under FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information. The written notice will provide the submitter an opportunity to object to disclosure of any specified portion of the records within the reasonable time period specified in the notice. The notice will either describe in detail the business information requested (*e.g.*, an entire contract identified by a unique number) or shall provide copies of the requested record(s) or record portions containing

the business information. When notification of a voluminous number of submitters is required, the FOIA Officer may notify the submitters by posting or publishing the notice in a place reasonably likely to accomplish notification.

(2) If the FOIA Officer determines to release business information over the objection(s) of the submitter, the FOIA Officer will notify the submitter pursuant to paragraph (e) of this section.

(3) Whenever the FOIA Officer notifies the requester of a final decision, the FOIA Officer will also notify the submitter by separate correspondence. This notification may be contained in VA’s FOIA decision.

(4) Exceptions to this notice provision are contained in paragraph (f) of this section.

(d) *Opportunity to object to disclosure.* When notification to a submitter is made pursuant to paragraph (c)(1) of this section, the submitter may object to the disclosure of any specified portion(s) of the record(s). The submitter’s objection(s) must be in writing, addressed to the FOIA Officer, and must be received by the reasonable date specified in the FOIA Officer’s notice in order for VA to consider such objections. If the submitter has any objection to disclosure of the record(s) requested, or any specified portion(s) thereof, the submitter must identify the specific record(s) or portion(s) of records for which objection(s) are made. The objection will specify in detail all grounds for withholding any record(s) or portion(s) of the record(s) upon which disclosure is opposed under any exemption of the FOIA. In particular, if the submitter is asserting that the record is protected under Exemption 4, 5 U.S.C. 552(b)(4), it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. The submitter must explain in detail how and why disclosure of the specified records would likely cause substantial competitive harm in the case of a required submission or state whether the records would customarily be disclosed by the submitter upon a request from the public in the case of a voluntary submission. The submitter’s objections must be contained within a

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single written response; oral responses or subsequent, multiple responses generally will not be considered. If the submitter does not respond to the notice described in paragraph (c)(1) of this section within the specified time limit, the submitter will be considered to have no objection to disclosure of the information.

(e) *Consideration of objection(s) and notice of intent to disclose.* The FOIA Officer will consider all pertinent factors, including but not limited to the submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of §1.557, when a FOIA Officer decides to disclose business information over the objection of the submitter, the FOIA Officer will provide the submitter with written notice, which includes:

(1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date of not less than ten (10) days from the date of the notice (to allow the submitter time to take necessary legal action).

(f) *Exceptions to notice requirements.* The notice requirements set forth in paragraphs (c) and (g) of this section will not apply if:

(1) The FOIA Officer determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public; or

(3) Disclosure of the information is required by statute, other than the FOIA, or by a regulation issued in accordance with the requirements of Executive Order 12600 or any other Executive Order.

(g) *Notice to requesters.* When VA receives a request for records that may contain confidential commercial information protected by FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information, the requester will be noti-

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fied that the request is being processed under the provisions of this regulation and, as a consequence, there may be a delay in receiving a response. The notice to the requester will not include any of the specific information contained in the records being requested.

[76 FR 51895, Aug. 19, 2011]

§ 1.559 Appeals.

(a) *Informal resolution prior to appeal.* Before filing an appeal, the requester may wish to communicate with the contact person listed in the FOIA response or the component's FOIA Officer to see if the issue can be resolved informally. Informal resolution of the requester's concerns may be appropriate, for example, where additional details may be required for a search for responsive records. Communication with VA at this level does not toll the time limit for filing an administrative appeal.

(b) *How to file and address a written appeal.* The requester may appeal an adverse determination denying the request, in any respect, except for those concerning Office of Inspector General records, to the VA Office of the General Counsel (024), 810 Vermont Avenue, NW., Washington, DC 20420. Any appeals concerning Office of Inspector General records must be sent to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue, NW., Washington, DC 20420. The FOIA appeal must be in writing. VA accepts facsimiles (faxes) as written FOIA appeals. If the appeal concerns documents protected by another confidentiality statute, the appeal must contain an image of the requester's handwritten signature, such as an attachment that shows the requester's handwritten signature. Information regarding where to fax the FOIA appeal is available on VA's FOIA home page on the Internet. See §1.552(a) for the pertinent Internet address. A legible return address must be included with the FOIA appeal; the requester may include other contact information as well, such as a telephone number and electronic mail (e-mail) address.

(c) *How to file an e-mail appeal.* VA will accept a FOIA appeal by e-mail. If