

## FOIA - THE FREEDOM OF INFORMATION ACT

## How Contractors Can Protect Their Business Information

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James E. Krause  
Jacksonville, Florida

Federal Contracts Attorney  
Telephone 904.353.5533

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It has become routine for some Federal contractors to provide Freedom of Information Act (FOIA) requests to the government in the hope of receiving valuable business or proposal information about your company and their other potential competitors. These FOIA letters may ask for pricing information in one of your proposals, or request general information about your services, methods, or products. Concerned contractors are asking questions, including:

- How can I protect my company information?
- What can my competition find out about my company?
- What kind of information is really privileged?
- Can I accidentally release my information and waive my rights?
- Will the Government release my proposal information to the public?
- Can I fight the release of my private company documents?

Your company did not provide a proposal to the government with the understanding or agreement that all the information enclosed in response to the Request for Proposal (RFP) would be made public. In order to respond fully to an RFP, your company was required to disclose some of its most valuable intellectual property, including trade secrets and confidential commercial or financial information. Providing this information to a government agency requires careful consideration, and you should identify all such information as confidential. Unfortunately, this information may be intentionally or inadvertently disclosed by a government agency to a third party, or may be disclosed under applicable Federal freedom of information laws.

When an agency receives a FOIA request, it notifies the contractor, typically including the notice letter, a copy of the FOIA request from the enquiring contractor, and instructions to the contractor that it must specifically justify nondisclosure of the information. FOIA Exemption 4 is supposed to protect the contractor against disclosure of confidential and/or proprietary information,



*James E. Krause, Esq.*

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**James E. Krause, Attorney**

219 N. Newnan St., 4th Floor, Jacksonville, FL 32202  
904.353.5533 • jimkrause@krauselaw.net • www.krauselaw.net

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including anything that would give an unfair, competitive advantage to a requestor. This should include protection against disclosure of any matter that is a trade secret or that constitutes commercial or financial information that is privileged or confidential. It is critical that your company immediately state in writing that a disclosure of such confidential information would jeopardize your company's commercial interests, and explain how it will cause substantial and immediate competitive harm. The U.S. Department of Justice Guide to FOIA is at: <http://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide>.

FOIA is a federal law that allows people to request information from the Federal Government. Under FOIA, those seeking information are no longer required to show a need for information; the "need to know" standard has been replaced by a "right to know" doctrine. The burden of proof for why certain information should be kept secret now falls on the government. In order to protect private entities such as contractors from disclosure of their confidential business documents, the Government created exemptions from FOIA. For contractors, the most important exemption is number 4.

Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." This exemption is intended to protect the interests of both the government and submitters of information. The very existence of Exemption 4 encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. The exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

The exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is: (a) commercial or financial; and (b) obtained from a person; and (c) privileged or confidential. (Department of Justice Guide to the Freedom of Information Act, p. 263) (5 U.S.C. § 552 (b)(4))

For contractors, the typical issue involves the second category of information.

#### Commercial or Financial

In order for information to be considered commercial or financial under Exemption 4 it must relate to business or trade. "The Court of Appeals for the District of Columbia Circuit has firmly held that these terms should be given their 'ordinary meanings' and has specifically rejected the argument that the term 'commercial' be confined to records that 'reveal basic commercial operations,' holding instead that records are commercial so long as the submitter has a 'commercial interest' in them." In *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978), the Court of Appeals for



**James E. Krause, Attorney**

219 N. Newnan St., 4th Floor, Jacksonville, FL 32202  
904.353.5533 • jimkrause@krauselaw.net • www.krauselaw.net

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the Second Circuit held that the term “commercial” “surely means pertaining or relating to or dealing with commerce.”

3 In a similar vein, the D.C. Circuit in *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987) has held when considering the safety reports submitted by the Institute for Nuclear Power Operations that the “character of the information it reports” is not determined by the nonprofit status of the provider; but rather that “information may qualify as ‘commercial’ even if the provider’s . . . interest in gathering, processing, and reporting the information is noncommercial.”

#### Obtained from a Person

The definition of a “person” as it applies to Exemption 4 includes information obtained from individuals, corporations, banks, state governments, and others; however it does not include information generated by the federal government, with some exceptions.

#### Confidential or Privileged

In the case of *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court held that the term “confidential” should be read to protect governmental and private interests under Exemption 4 in accordance with a two-part test. That test determined that commercial or financial information was ‘confidential’ if its disclosure was likely to:

- a) Impair the Government’s ability to obtain necessary information in the future; **OR**
- b) Cause substantial harm to the competitive position of the person who provided the information.

In a typical sample case, a Contractor who provided what they believe to be confidential or otherwise protected information would seek to restrain the Agency who collected the information from releasing it to a third party in response to a FOIA request. The company whose information is being released has the right to file a reverse FOIA action.

The Contractor will state disclosure of its information would jeopardize their commercial interests or reveal information about their ongoing operations. In support, Contractor’s president typically submits an affidavit attesting to the facts in this matter and addressing the issue of the proposal, and its bottom line price, as confidential commercial information, including the competitive harm it will cause. The Contractor may be concerned on a general level with release of confidential commercial information, but also note there is a specific harm in a particular case. Contractor will provide factual information regarding its objection, such as a long term relationship at a particular Federal location with highly specialized requirements, definitizing its concern that the agency must not publicize its confidential commercial information.



**James E. Krause, Attorney**

219 N. Newnan St., 4th Floor, Jacksonville, FL 32202  
904.353.5533 • jimkrause@krauselaw.net • www.krauselaw.net

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The Contractor is not required to document or pinpoint actual harm, but need only show its likelihood. *Boeing* demonstrates this, finding that submitter "is not required to prove that substantial harm is 'certain' to result from disclosure, but only that such harm is 'likely'". *Boeing Co. v. U.S. Dep't of the Air Force*, No. 05-365, 2009 WL 1373813, at \*4 (D.D.C. May 18, 2009). Actual competitive harm need not be demonstrated for purposes of the competitive harm prong; rather, evidence of "actual competition and a likelihood of substantial competitive injury" is all that need be shown. *CNA*, 830 F.2d at 1152.

The Contractor's typical position is that all records submitted to the Agency during the course of a solicitation or contract were required to be submitted by law, regulation or the terms and conditions of the contract. As such, the standards established in *National Parks & Conservation Ass'n v. Morton*, 498 F. 2d 770 (D.C. Cir 1974) must be applied in determining that such records are protected from release under Exemption 4.

The great majority of Exemption 4 cases have involved the competitive harm prong of the test for confidentiality established in *National Parks & Conservation Ass'n v. Morton*.

Information is "confidential" under this prong if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."

In *National Parks*, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one. Thus, whether information would customarily be disclosed to the public by the person from whom it was obtained was not considered dispositive. Likewise, an agency's promise that information would not be released was not considered dispositive. Instead, the D.C. Circuit declared in *National Parks* that the term "confidential" should be read to protect governmental and private interests in accordance with the following two-part test:

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects:

- (1) To impair the Government's ability to obtain necessary information in the future; **OR**
- (2) To cause substantial harm to the competitive position of the person from whom the information was obtained.

*"Information is "confidential" under this prong if disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."*

*- National Parks & Conservation Ass'n v. Morton. 498 F. 2d 770 (D.C. Cir. 1974)*



**U.S. Capital Building in Washington D.C.**



**James E. Krause, Attorney**

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Through its en banc decision in *Critical Mass Energy Project v. NRC*, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is "confidential" under Exemption 4. Specifically, the tests for confidentiality set forth in *National Parks & Conservation Ass'n v. Morton*, were confined "to the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government."

Pursuant to *National Parks, Critical Mass*, release of the Contractor's information could cause substantial competitive harm to Contractor's ongoing business position. The Contractor must be prepared to identify the facts that substantiate their position.

Typically the Contractor spent substantial amounts of time, money, and effort preparing its Proposal in response to and as required by the Federal government. This information results in information which is only revealed by the government if the Contractor is actually awarded the contract. The Contractor maintains strict control over its proposals in house, and distribution of this knowledge is on a need to know basis. They do not publicize their proposal information to their competitors specifically, or the public at large. This information should not be released. Or, the Contractor may also have a specialized situation providing services on an ongoing basis. The Contractor would thus have a unique knowledge and experience and be concerned with not allowing its confidential commercial information to be publicized.

Should the Court decide to consider whether the Contractor's information was "voluntarily" submitted, the test for the protection of information that is "voluntarily" submitted: Such information is categorically protected provided it is not "customarily" disclosed to the public by the submitter. Under *Critical Mass*, once information is determined to be voluntarily provided, it is afforded protection as "confidential" information "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." The Contractor will state they do not release this information to the public, limit distribution of proposal information within the company on a "need to know" basis, and do not "customarily" disclose their prices to the public. Prices submitted in response to a solicitation for a government contract are "required" submissions pursuant to *Canadian Commercial Corp. v. Dep't of the Air Force*, 442 F. Supp. 2d 15, 29 (D.D.C. 2006), aff'd, 514 F.3d 37 (D.C. Cir. 2008).

Sole Source Contractors may have a different problem. The Federal Acquisition Regulation (FAR) now includes information on FOIA at FAR Part 24, and DOD has established policies regarding provision of financial information and to determine and protect sensitive information. However, if your company is the sole proposer on a contract, the government has the right to receive and review all your company information, down to unit prices, profits, and wages. This information may become part of the contract, which is information that could be subject to a FOIA request by



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your competition. This puts all your competitive advantages at risk of publication by the Government.

6 How can your company protect its commercial information and avoid competitive harm? Addressing the sole proposer issue, don't simply agree and provide written copies of all your company's confidential information. Agree to a meeting with the agency and show their people whatever they need to see. Allow the Government reasonable time to sit and review any documents requested and agreed to. But try to avoid providing sensitive documents or copies to the Government that could make their way into the hands of your competitors.

### CONCLUSION

It is critical for your company to institute protective measures for potentially sensitive information submitted to the government.

- First, all information that your company does not want released should be clearly marked as proprietary on any documents you submit to the government.
- Second, whenever the agency gives your company notice of an outside FOIA request for company submitted information, immediately notify the agency in writing of your objection. It will be necessary to provide specific explanations to the agency demonstrating how release of this information will cause damage to your company's competitive advantages and identifying this information is not in the public domain.
- Non-response to a government FOIA notification may be deemed an agreement to release the requested information to the third party.

The answer is specifically and clearly identifying your company's confidential information as such on the actual documents provided to the Government to avoid release of sensitive information that can cause substantial competitive harm.

Once again, you must always be on guard to monitor and to protect your company information. We strongly suggest you seek competent legal assistance if you receive a notice of a FOIA request from the government.

*James E. Krause is an attorney who primarily practices in the field of Federal Contract Law. His law firm is located in Jacksonville, Florida. Feel free to contact us if you have any questions about this article.*



**James E. Krause, Attorney**

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**FEDERAL SOURCE MATERIAL****FAR Subpart 24.2- Freedom of Information Act****24.201 Authority.**

The Freedom of Information Act (5 U.S.C. 552, as amended) provides that information is to be made available to the public either by . . . (c) Upon request, providing a copy of a reasonably described record.

**24.202 Prohibitions.**

(a) A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal. (See 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m).)

(b) No agency shall disclose any information obtained pursuant to 15.403-3(b) that is exempt from disclosure under the Freedom of Information Act. (See 10 U.S.C. 2306a(d)(2)(C) and 41 U.S.C. 254b(d)(2)(C).)

**FAR 3.104-4 -- Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information.**

(a) Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by agency head or the contracting officer to receive such information.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with [14.401](#), [15.207](#), applicable law, and agency regulations.

(c) Individuals unsure if particular information is source selection information, as defined in [2.101](#), should consult with agency officials as necessary. Individuals responsible for preparing material that may be source selection information as described at paragraph (10) of the “source selection information” definition in [2.101](#) must mark the cover page and each page that the individual believes contains source selection information with the legend “*Source Selection Information -- See FAR [2.101](#) and [3.104](#).*” Although the information in paragraphs (1) through (9) of the definition in 2.101 is considered to be source selection information whether or not marked, all reasonable efforts must be made to mark such material with the same legend.

(d) Except as provided in subparagraph (d)(3) of this subsection, the contracting officer must notify the contractor in writing if the contracting officer believes that proprietary information, contractor bid or proposal information, or information marked in accordance with [52.215-1\(e\)](#) has been inappropriately marked. The contractor that has affixed the marking must be given an opportunity to justify the marking.

(1) If the contractor agrees that the marking is not justified, or does not respond within the time specified in the notice, the contracting officer may remove the marking and release the information.

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(2) If, after reviewing the contractor's justification, the contracting officer determines that the marking is not justified, the contracting officer must notify the contractor in writing before releasing the information.

(3) For technical data marked as proprietary by a contractor, the contracting officer must follow the procedures in [27.404-5](#).

(e) This section does not restrict or prohibit --

(1) A contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(2) The disclosure or receipt of information, not otherwise protected, relating to a Federal agency procurement after it has been canceled by the Federal agency, before contract award, unless the Federal agency plans to resume the procurement;

(3) Individual meetings between a Federal agency official and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur; or

(4) The Government's use of technical data in a manner consistent with the Government's rights in the data.

(f) This section does not authorize --

(1) The withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any release containing contractor bid or proposal information or source selection information must clearly identify the information as contractor bid or proposal information or source selection information related to the conduct of a Federal agency procurement and notify the recipient that the disclosure of the information is restricted by 41 U.S.C. chapter 21;

(2) The withholding of information from, or restricting its receipt by, the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract;

(3) The release of information after award of a contract or cancellation of a procurement if such information is contractor bid or proposal information or source selection information which pertains to another procurement; or

(4) The disclosure, solicitation, or receipt of bid or proposal information or source selection information after award if disclosure, solicitation, or receipt is prohibited by law. (See [3.104-2\(b\)\(5\)](#) and [Subpart 24.2](#).)



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**The Department of Defense emphasizes this:****10 U.S.C. §2305 Armed Forces**

(g) Prohibition on Release of Contractor Proposals.—(1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term “proposal” means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

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