

## Contract Formation

# Activity 29: Inquiries and Freedom of Information Act (FOIA) Requests

*Procedures for responding to a public request to information.*

**Related Flow Charts:** [Flow Chart 29](#)

**Related Courses:** [CON 121](#), [CON 124](#)

### Part A: Inquiries About Invitations for Bids (IFBs) and Solicitations

Tasks	FAR Reference(s)	Additional Information
1. Inform government personnel of their roles in responding to inquiries.	FAR 5.4 Release of information [publicizing contract actions].	<p>Other government personnel should refuse to answer any inquiry not submitted through the contracting officer.</p> <p>In sealed bidding, only the contracting officer or others specifically authorized may conduct exchanges and transmit technical information about a solicitation.</p> <p>In a negotiated acquisition, after release of a request for proposals (RFP), the contracting officer is the focal point for all exchanges with potential offerors.</p> <p>In a simplified acquisition with an estimated price of \$3,000 or more, the contracting officer should be the focal point of all exchanges after the request for quotation (RFQ) is issued.</p>
2. Identify restrictions and permissibility on the release of information.	<p>FAR 3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information [procurement integrity].</p> <p>FAR 5.406 Public disclosure of justification documents for certain contract actions.</p> <p>FAR 9.105-3 Disclosure of preaward information [contractor qualifications].</p>	<p>In sealed bidding, authorized personnel:</p> <ul style="list-style-type: none"><li>• Must not furnish any information to a prospective bidder that may provide an advantage;</li><li>• May furnish general information that would not be prejudicial to other prospective bidders; and</li><li>• May furnish more specific information or clarifications by amending the solicitation.</li></ul> <p>In a negotiated action, the contracting officer:</p> <ul style="list-style-type: none"><li>• May disclose general information about agency mission</li></ul>

Tasks	FAR Reference(s)	Additional Information
	<p>FAR 14.211 Release of acquisition information [sealed bidding].</p> <p>FAR 14.401 Receipt and safeguarding of bids [opening of bids and award of contract].</p> <p>FAR 14.402-1 Unclassified bids [opening of bids].</p> <p>FAR 14.402-2 Classified bids [opening of bids].</p> <p>FAR 15.201 Exchanges with industry before receipt of proposals.</p> <p>FAR 15.207 Handling proposals and information.</p> <p>FAR 15.306 Exchanges with offerors after receipt of proposals.</p> <p>FAR 15.503 Notifications to unsuccessful offerors.</p> <p>FAR 15.505 Preaward debriefing of offerors.</p>	<p>needs and future requirements at any time;</p> <ul style="list-style-type: none"> <li>• Must make specific information necessary for the preparation of proposals;</li> <li>• Must not disclose the potential offeror's confidential business strategy protected under FAR 3.104 or FAR 24.2; and</li> <li>• Will make available at a preproposal conference any materials to all potential offerors.</li> </ul> <p>In contracting by negotiation, authorized personnel:</p> <ul style="list-style-type: none"> <li>• After release of the solicitation, information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under FAR 3.104 or FAR Subpart 24.2.</li> <li>• Proposals must be safeguarded from unauthorized disclosure throughout the source selection process.</li> <li>• Debriefings must not include not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by FAR 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including— <ul style="list-style-type: none"> <li>○ Trade secrets;</li> <li>○ Privileged or confidential manufacturing processes and techniques;</li> <li>○ Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and</li> <li>○ The names of individuals providing reference information about an offeror's past performance.</li> <li>○ An official summary of the debriefing shall be included in the contract file.</li> </ul> </li> </ul>

Tasks	FAR Reference(s)	Additional Information
3. Conduct investigation if required to prepare a response.	FAR 3.104-4(c) Disclosure, protection, and marking of contractor bid or proposal information and source selection information [procurement integrity].	Consult legal or technical personnel if necessary. Request and obtain all information necessary for an accurate and complete response.
4. Determine if amending or cancelling the invitation for bids (IFB) or solicitation is appropriate.	FAR 14.208 Amendment of invitation for bids. FAR 14.209 Cancellation of invitations before opening. FAR 15.206 Amending the solicitation.	In sealed bidding, an amendment is required to furnish information or clarifications. When using negotiation procedures: <ul style="list-style-type: none"> <li>• Specific information necessary must be made available to the public as soon as practicable. This is normally done with a solicitation amendment.</li> <li>• Information in response to a firm's request must not be disclosed if doing so would reveal confidential business strategy that is protected under FAR 3.104 or FAR 24.2.</li> </ul>

### Part B: Freedom of Information Act (FOIA) Requests

Tasks	FAR Reference(s)	Additional Information
1. Determine whether the Freedom of Information Act (FOIA) request is for records that are exempt from mandatory public disclosure.	FAR 24.2 Freedom of Information Act [protection of privacy and freedom of information]. Department of Justice Guide to the Freedom of Information Act (2009 Edition).	The Freedom of Information Act requires federal agencies to make their records promptly available to any person who makes a proper request for them. The FOIA's nine exemptions authorize federal agencies to withhold information covering: <ul style="list-style-type: none"> <li>• Classified national defense and foreign relations information;</li> <li>• Internal agency personnel rules and practices;</li> <li>• Information that is prohibited from disclosure by another federal law;</li> <li>• Trade secrets and other confidential or privileged commercial or financial information;</li> <li>• Inter-agency or intra-agency communications that are protected by legal privileges;</li> <li>• Information involving matters of personal privacy;</li> </ul>

Tasks	FAR Reference(s)	Additional Information
		<ul style="list-style-type: none"> <li>• Records or information compiled for law enforcement purposes, to the extent that the production of those records: <ul style="list-style-type: none"> <li>○ Could reasonably be expected to interfere with enforcement proceedings,</li> <li>○ Would deprive a person of a right to a fair trial or an impartial adjudication,</li> <li>○ Could reasonably be expected to constitute an unwarranted invasion of personal privacy,</li> <li>○ Could reasonably be expected to disclose the identity of and/or information provided by a confidential source,</li> <li>○ Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, or</li> <li>○ Could reasonably be expected to endanger the life or physical safety of any individual;</li> </ul> </li> <li>• Information relating to the supervision of financial institutions; and</li> <li>• Geological information on wells.</li> </ul> <p>Follow agency regulations and guidance as well as Department of Justice (DOJ) guidance. Request any necessary advice and assistance from the agency's Chief FOIA Officer and/or the FOIA Public Liaison.</p>

Tasks	FAR Reference(s)	Additional Information
<p>2. Upon receipt of a FOIA request, assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester.</p>	<p>FOIA Post, “OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests” (posted 11/18/08).  Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>For those requests where an agency can quickly make a response, i.e., can respond within ten days or less, there is no requirement that a tracking number be assigned. In those circumstances, the agency can simply respond to the requester by providing the responsive records and need not be slowed down by the necessity of assigning a tracking number to the request. Nevertheless even though an individualized tracking number is not required to be utilized for such requests, agencies should be certain to keep track of all requests they handle so that all the information required to be included in agency Annual FOIA Reports is compiled and reported.</p>
<p>3. Verify that the requestor has submitted a proper FOIA request.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>The FOIA specifies two requirements for an access request: It must “reasonably describe” the records sought and it must be made in accordance with the agency’s published FOIA regulations. Ordinarily, a person need not title a request for government records a “FOIA request,” and so agencies should use sound judgment when determining the nature of an access request.</p> <p>FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters, or to allow requesters to conduct “fishing expeditions” through agency files. Although a FOIA request might be very broad or burdensome in magnitude, this does not necessarily entitle an agency to deny that request on the basis that it does not “reasonably describe” the records sought.</p>

Tasks	FAR Reference(s)	Additional Information
<p>3a. If the requestor submits an improper FOIA request, clarify the scope of the request with the requestor, and assist the requester in reformulating the request.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>While the scope of a FOIA request is most commonly thought of in terms of the subject matter of the records sought, the scope of a request is also defined by when the requested records were created. The temporal scope of a FOIA request is typically established through the agency's use of a "cut-off" date—i.e., records created after that date are treated as not responsive to the request. A cut-off date that is based on the date of the search results in a much fuller search and disclosure than a less inclusive "cut-off" date, such as one based on the date of the request or its receipt by the agency. Regardless of which type of "cut-off" date an agency adopts, it is obliged to inform FOIA requesters of that date.</p>
<p>4. Upon receipt of a proper FOIA request, make a determination on the request within twenty working days, seeking assistance from the FOIA Public Liaison as necessary.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>An agency is not necessarily required to release the records within that statutory time limit, but it must make its determination within that time and access to releasable records should, at a minimum, be granted promptly thereafter.</p> <p>The twenty-day time period begins on the date the request is first received by the appropriate agency component (or office), but no later than ten days after the request is first received by any component within the agency that is designated by the agency's regulations to receive FOIA requests.</p> <p>In "unusual circumstances," an agency can extend the twenty-day time limit for processing a FOIA request if it tells the requester in writing why it needs the extension and when it will make a determination on the request. If the required extension exceeds ten days, the agency must allow the requester an opportunity to modify his or her request, or to arrange for an alternative time frame for completion of the agency's processing.</p> <p>An agency's failure to comply with the statutory time limits may preclude the agency's ability to assess fees.</p>

Tasks	FAR Reference(s)	Additional Information
<p>5. Determine whether to grant a request for expedited access within ten calendar days of its receipt.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>Agency regulations must provide for the expedited processing of FOIA requests for requesters who demonstrate “compelling need,” or for any other case deemed appropriate under agency regulations. Under the FOIA, a requester can show “compelling need” in one of two ways:</p> <ul style="list-style-type: none"> <li>• By establishing that his or her failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or</li> <li>• If the requester is a person primarily engaged in disseminating information, by demonstrating that an urgency to inform the public concerning actual or alleged Federal Government activity exists.</li> </ul>
<p>6. Undertake a search that is reasonably calculated to uncover all relevant documents.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>The adequacy of an agency's search is judged by a test of “reasonableness,” which will vary from case to case.</p>
<p>7. Upon locating records responsive to a FOIA request, determine whether any of those records, or information contained in those records, originated with another agency or agency component.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>As a matter of sound administrative practice, consult with any other agency or other agency component whose information appears in the responsive records, especially if that other agency or component is better able to determine whether the information is exempt from disclosure. If the response to the consultation is delayed, notify the requester that a supplemental response will follow when the consultation is completed.</p> <p>If an agency or component locates entire records originating with another agency or component, it should refer those records to their originator for its direct response to the requester. Advise the requester of the referral and of the name of the agency FOIA office to which it was made. Even after they make such record referrals in response to FOIA requests, the original recipient retains the responsibility of defending any agency action taken on those records if the matter proceeds to litigation.</p>

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<p>8. Complete a segregability analysis and determine which portion of the responsive documents can be disclosed as nonexempt and which portions can be appropriately withheld as exempt.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>The FOIA requires that any reasonably segregable portion of a record must be released after appropriate application of the Act's nine exemptions. Segregability should not be determined based on an evaluation of whether nonexempt portions of documents would be "helpful" to the requester if segregated and released. When nonexempt information is inextricably intertwined with exempt information, reasonable segregation is not possible. Segregation is not reasonable when it would produce an essentially meaningless set of words and phrases, such as disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.</p>
<p>9. Respond to inquiries regarding the status of FOIA requests, seeking assistance from the FOIA Public Liaison as necessary.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>FOIA Public Liaisons are responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.</p>
<p>10. Release information authorized for disclosure in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.</p>	<p>FAR 24.2 Freedom of Information Act [protection of privacy and freedom of information].  Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>Courts have held that agencies responding to FOIA requests need not process and disclose non-responsive records or non-responsive portions of otherwise responsive records.  If an agency or component determines that it does not maintain any record responsive to a particular FOIA request, it generally is under no obligation to "forward" the request (which is distinct from "referring" records) to any other agency or component where such records might be located unless it is obligated to do so under agency-specific regulations.</p>

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<p>11. When denying a request in full or in part, provide the requester with certain information about the action taken on the request.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>Make a reasonable effort to estimate the amount of information withheld and inform the requester of that amount, unless doing so would harm an interest protected by an applied exemption.</p> <p>For any records released in part, the records must show:</p> <ul style="list-style-type: none"> <li>• The amount of information withheld;</li> <li>• The location of the withholding within the record; and</li> <li>• The exemption being asserted, unless doing so would harm an interest protected by an applied exemption.</li> </ul> <p>A decision to deny an initial request must inform the requester of the reasons for denial, the right to appeal, and the name and title of each person responsible for the denial. Include administrative appeal rights notifications in any responses to requesters where they are advising that no records responsive to the request could be located.</p>
<p>12. “Route” any “misdirected” FOIA request to the appropriate agency component within ten days of receiving the request.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>If a requester mistakenly sends a FOIA request to an agency component that is designated to receive FOIA requests, but is not itself the proper component within the agency to process that request, that receiving component is now obligated to "route" the "misdirected" request to the appropriate component within that agency within ten days of receiving the request.<sup>153</sup> If the initial receiving component fails to route such a request to the proper component within ten days, the proper component's twenty-day time period to make a request determination begins to run nevertheless (provided that the request is otherwise a proper FOIA request).<sup>154</sup> This routing requirement applies exclusively to components within an agency; it does not obligate components of an agency to route requests to components of a different agency.</p>
<p>13. Make a determination on an administrative appeal within twenty working days after its receipt.</p>	<p>Department of Justice Guide to the Freedom of Information Act (2009 Edition).</p>	<p>An administrative appeal decision upholding an adverse determination must inform the requester of the provisions for judicial review of that determination in the federal courts.</p>

Tasks	FAR Reference(s)	Additional Information
14. Seek mediation services from the Office of Government Information Services (OGIS) of the National Archives and Records Administration (NARA), if necessary.	Department of Justice Guide to the Freedom of Information Act (2009 Edition).	OGIS establishes mediation services to resolve disputes between persons making FOIA requests and administrative agencies, and may issue advisory opinions if mediation has not resolved the dispute.