



# FOIA Document Guide

## How to Respond to a Document Request During the Procurement Process

Version 3.1

Effective: **July 2020**

**Division of Procurement Services**

*This document does not create a binding procedure or create rights or obligations for or against the State. Rather, this document provides recommendations to procurement officers in the State's Division of Procurement Services to assist them in fulfilling their responsibilities under FOIA.*

During the 2019 legislative session, the General Assembly enacted broad amendments to the Consolidated Procurement Code. Changes to S.C. Code Ann. § 11-35-410, Public access to procurement information, significantly affect how the Division responds to public records requests. Those changes include:

- Granting express authority to provide for disposition of offers where no award is made, § 11-35-410(C). In response the State Fiscal Accountability Authority promulgated changes to Regulations 19-445.2045C and 2095B, and repealed Regulations 19-445.2065D and 2097D.
- Authorizing issuance of a solicitation with confidential portions available only upon execution of a nondisclosure agreement, § 11-35-410(E). The Authority published Regulation 19-445.2010F detailing the circumstances where agencies may do this and providing for an approval process.
- Accelerating disclosure of procurement information necessary to determine whether and on what grounds to protest a contract award, § 11-35-410(F).

Version 3.1 reflects statutory and regulatory changes resulting from 2019 Act No. 41, as well as editorial changes intended to enhance reader understanding.

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## **I. INTRODUCTION: HOW TO USE THIS GUIDE**

This Freedom of Information Act (FOIA) Document Guide (Guide) includes instructions and form letters, which you should use together.

You should review this Guide in conjunction with the general policy of South Carolina State Fiscal Accountability Authority (SFAA) regarding FOIA requests, in the “News Media, FOIA, and Elected Official Requests Policy and Procedure” section (revised May 2019) of SFAA’s Policies and Procedures Manual (Manual). *See* Appendix VIII.D.

This Guide addresses only those FOIA requests from non-news media that seek documents received or generated in connection with the procurement process. You should refer all news media requests under FOIA, or requests originating from non-news media which concern sensitive matters or issues of interest to SFAA’s board members and/or the Office of the Executive Director, to SFAA’s Communications Coordinator.

This Guide recommends a model approach. Notwithstanding the use of words like “shall,” “must,” or “should,” this Guide is not a binding policy or procedure. Whenever you deviate from the recommended approach, consult with your supervisor or legal counsel.

This model approach applies only to those solicitations, including requests for qualifications (RFQs), which were issued after the revision date on the Guide’s cover. This version also includes revised FOIA bidding instructions. *See* Appendix VIII.C.

This Guide is general in nature and is not intended to address every possible situation or every document you may find in a procurement/contract file. Therefore, you should review all responses to a FOIA request on a case-by-case basis.

This Guide requires periodic updating because statutes can be rewritten or re-interpreted, and policies can be amended. This Guide is current as of the revision date listed on the cover.

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## II. POTENTIAL PENALTIES: FOIA AND THE SC TRADE SECRETS ACT

Both FOIA<sup>1</sup> and the South Carolina Trade Secrets Act<sup>2</sup> create civil liability for failure to follow their mandates. The Trade Secrets Act also provides criminal penalties. While one statute requires disclosure, the other forbids it. Given this tension, negotiating the requirements of both may be troublesome for buyers. However, a review of these Acts' requirements and penalties suggests ways to avoid difficult problems.

Under FOIA, any person has the right to inspect or copy any public record of a public body unless those records are exempt from disclosure. S.C. Code Ann. § 30-4-30(a)(1). If a court finds that a public body has acted arbitrarily and capriciously by refusal or delay in disclosing or providing copies of a public record, it may impose a civil fine of five hundred dollars. S.C. Code Ann. § 30-4-110. In contrast, the Trade Secrets Act makes it a crime to “wrongfully” obtain, copy, send, or communicate trade secrets if the person has a reason to believe that the action will injure the owner of the trade secret and benefit a person other than the owner. A person may be fined not more than \$100,000 or imprisoned up to 10 years, or both, for a violation. S.C. Code Ann. § 39-8-90(A). The statute does not define “wrongfully.”

Both of these statutes create some type of civil liability. FOIA allows a party to seek declaratory and injunctive relief to enforce the party's right of access. S.C. Code Ann. § 30-4-100(a). If the party prevails, it “may be awarded reasonable attorney fees and other costs of litigation.” S.C. Code Ann. § 30-4-100(b). In contrast, the Trade Secrets Act provides civil remedies for the wrongful disclosure or misappropriation of trade secrets. S.C. Code Ann. § 39-8-30(C). “Misappropriation” includes disclosing the trade secret of another by someone without consent who, at the time of disclosure, had reason to know that he acquired knowledge of the trade secret under circumstances giving rise to a duty to maintain its secrecy or limit its use. S.C. Code Ann. § 39-8-20(2)(c)(ii)(B).

Assuming that buyers in the Division of Procurement Services (Information Technology Management Office (ITMO) and State Procurement Office (SPO)) have a duty to maintain secrecy under the Trade Secrets Act,<sup>3</sup> they would not be liable if

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<sup>1</sup> S.C. Code Ann. §§ 30-4-10 to -110 (Supp. 2018). Unless otherwise indicated, all statutory citations contained within this Guide reference the 2018 Supplement.

<sup>2</sup> S.C. Code Ann. §§ 39-8-10 to -130.

<sup>3</sup> *Reference for Legal Staff*: At least one South Carolina circuit court judge made the opposite assumption. See *S.C. Coin Operators Assoc. v. S.C. Dep't of Revenue*, No. 97-CP-40-1321 (Richland County, S.C., Cir. Ct., March 5, 1998). In that case, Judge McKellar concluded that the legislature would have specifically required the Department of Revenue to keep certain information secret if any duty of confidentiality existed. Cf. *South Carolina Tax Commission v. Gaston Copper Recycling Corp.*,

the trade secret's owner consented to disclosure.<sup>4</sup> Consent can be express or implied. Our standard solicitation forms require the vendor's consent to release any information that a vendor does not believe is either confidential or a trade secret. Because DPS will rely on a vendor's characterization of its information as being either a trade secret or confidential, our solicitations also require a vendor to indemnify the State of South Carolina (State) if the State incurs damages by relying on such characterizations.

By adding this as well as other certain language to its standard forms, DPS may be able to better comply with these Acts. In fact, both the South Carolina Consolidated Procurement Code (Code)<sup>5</sup> and SFAA's Procurement Regulations<sup>6</sup> (Regulations) expressly contemplate such instructions. Therefore, this Guide includes suggested standard bidding instructions, which you should use in all DPS solicitations. *See* FOIA Bidding Instructions, Appendix VIII.C.

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316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994) (“[E]ven if the information qualifies as trade secrets, the exemption creates no duty of confidentiality and Tax Commission may disclose it at its discretion.”) (*dicta*). *Gaston Recycling* did not determine if the information requested was, in fact, a trade secret; nor did the court opine on potential liability under the Trade Secrets Act.

<sup>4</sup> S.C. Code Ann. § 39-8-20(2)(c).

<sup>5</sup> “For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.” S.C. Code Ann. § 11-35-410(D) (as amended by 2019 Act No. 41, § 7, effective May 13, 2019).

<sup>6</sup> “The invitation for bids...shall include the following, as applicable:...Instructions to bidders on how to visibly mark information which they consider to be exempt from public disclosure,” Reg. 19-445.2095C(2); “As provided by the solicitation, offerors must visibly mark all information in their proposals that they consider to be exempt from public disclosure,” Reg. 19-445.2030(4).



### III. PROTEST-RELATED REQUESTS

Under the Code, an actual offeror who wishes to protest a contract award must notify the chief procurement officer in writing within seven business days after the award statement is posted, and must file its actual protest within *15 calendar days*.<sup>7</sup> In contrast, FOIA gives the State *10 business days*, which excludes weekends and state holidays, to respond to a request for documents.<sup>8</sup> To address this gap, the Code now requires disclosure to actual offerors sooner than FOIA does. **As outlined below, the statute provides the procurement officer only 5 calendar days to respond to a FOIA request.**

Ultimately, business bears the burden of requesting documents early enough to protect their rights, but procurement staff should take reasonable steps to make the relevant procurement documents available soon enough to facilitate a business' ability to exercise its statutory right to protest.

Section 11-35-410(F)<sup>9</sup> provides as follows:

If requested in writing before a final award by an actual bidder, offeror, contractor, or subcontractor with regard to a specific intended award or award of a contract, the procurement officer shall, within five days of the receipt of any such request, make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer. Without otherwise limiting any other exemptions granted by law, and except as provided herein, documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

Therefore, the Code read in conjunction with FOIA does the following:

#### A. Requires action within **5 calendar days**

1. Under the Code and any ensuing Regulations, “days” means calendar days. To calculate the time, consider the day after you receive the written request to be the first day of the 5-day period. You then count 5 calendar days to determine your deadline to comply. If the fifth day falls on a weekend or

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<sup>7</sup> S.C. Code Ann. §§ 11-35-310(13) (as amended by 2019 Act No. 41, § 6, effective May 13, 2019) and 11-35-4210(1)(b) (as amended by 2019 Act No. 41, § 56, effective May 13, 2019).

<sup>8</sup> S.C. Code Ann. § 30-4-30(c) (2017).

<sup>9</sup> As amended by 2019 Act No. 41, § 7, effective May 13, 2019.

state holiday, then your time to comply runs to midnight of the next business day. S.C. Code Ann. § 11-35-310(13)<sup>10</sup>.

2. **The shortened response time only applies between the time the award statement is posted and the date on which it becomes final. The standard FOIA timeline applies to requests made after final award.**

B. Requires an opportunity to inspect applicable documents

1. FOIA requires you to make documents “available for inspection or copying.” In contrast, the Code only requires that the documents be “available for inspection.” Certainly, you can provide copies, but you must not delay release while copies are made.
2. If you allow a business to inspect original records, note that unsupervised access is prohibited. *See* When and How to Respond, Step #1, Item 1.h.

C. Applies only to a request from an “actual bidder, offeror, contractor, or subcontractor.” The Division interprets this language to mean a business that has submitted a bid or proposal (or one who has submitted a subcontract or material bid to an actual bidder or offeror<sup>11</sup>) in response to a solicitation.

D. Applies only to “documents directly related to the procurement activity not otherwise exempt from disclosure....”

1. Since the statute only applies to requests from actual offerors, it only requires access to documents related to the solicitation to which the requesting business is an actual offeror.
2. Note that § 11-35-410(F) clarifies that the discretionary FOIA exemption for “documents of and documents incidental to proposed contractual arrangements...” ceases to be applicable after the award statement is posted. *See* § 30-4-40(a)(5).
3. Section 11-35-410(F) also clarifies that documentation of negotiations must be made available after award posting. This does not override the provisions of other exemptions, such as trade secrets (§ 30-4-40(a)(1)), personal information (§ 30-4-40(a)(2)), confidential or proprietary information (§ 30-

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<sup>10</sup> As amended by 2019 Act No. 41, § 6, effective May 13, 2019

<sup>11</sup> *See Appeal by Palmetto Traffic Group, LLC*, Panel Case No. 2014-3(II) (recognizing a prospective subcontractor’s right to protest contract award).

4-40(a)(5)(c)), or privileged and confidential information (§ 11-35-410(A) and (B)).

E. Requires a response from the Procurement Officer.

F. Requires any inspection to be at the office of the Procurement Officer.

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#### IV. WHEN AND HOW TO RESPOND

The rules on when to respond have changed since the last edition of this guide. Two separate deadlines concern procurement officers. The first is under FOIA itself. Section 30-4-30(c) requires a public body to respond within ten business days after receipt of a written request.<sup>12</sup> If the records requested are more than two years old, the agency has twenty business days to respond. The response must notify the requestor whether the agency will produce the documents described in the request, or, if not, the reasons for withholding documents. If the request is granted, the documents must be furnished within thirty calendar days after the determination (thirty-five days if the documents requested are more than two years old). These deadlines can be extended by consent.<sup>13</sup> In the past, an agency's failure to respond timely had few consequences. However, a recent Supreme Court decision ordered a State agency to pay the requestor's attorneys' fees, even though it had furnished the requested documents.<sup>14</sup>

The second deadline is discussed in greater detail in the previous chapter. It appears in S.C. Code Ann. § 11-35-410(F):

If requested in writing before a final award by an actual bidder, offeror, contractor, or subcontractor with regard to a specific intended award or award of a contract, the procurement officer shall, within five days of the receipt of any such request, make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer. Without otherwise limiting any other exemptions granted by law, and except as provided herein, documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

Under the Consolidated Procurement Code, “days” means calendar days.<sup>15</sup> The deadline under the regulation is not only shorter, it is calculated differently from the FOIA response time. The procurement deadline also requires *inspection* within five days, not just a response. Because of the compressed disclosure timeframe, you may

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<sup>12</sup> Specifically, the State “shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons for it...” S.C. Code Ann. § 30-4-30(c) (Supp. 2018).

<sup>13</sup> They are also extended if the agency requires a deposit. See Step 4, page 14.

<sup>14</sup> *Sloan v. S.C. Department of Revenue*, 409 S.C. 551, 762 S.E.2d 687 (2014). The Department's initial response acknowledged the request, but failed to state whether it would allow inspection of documents.

<sup>15</sup> S.C. Code Ann. § 11-35-310(13).

not need all of the formal elements that follow when responding to a request during the protest period.

You should follow the steps below for requests. The underlying principle is to release as much information as possible, as early in the process as possible, but only to the extent that release (1) does not undermine the competitive process; and (2) violates no prohibition against disclosure. However, this Guide merely offers suggestions regarding what documents to release and when. You should raise any specific concerns with your supervisor or legal counsel, particularly when asked to disclose documents you think might impair the competitive process or negatively impact the State's best interest.

## **A. Step 1: Review the Request**

### **1. General rules**

- a. DPS's obligations under FOIA are only triggered when we receive a written request. E-mail is considered to be a "written request."
- b. FOIA obligates the State to release documents, not information. FOIA does not require state employees to answer written questions, to extract information from documents or to summarize information.<sup>16</sup> However, if it is more efficient to simply provide the information, you may do so.

For example, you receive a request to release information in a particular format, such as a list of the evaluators. You have evaluation forms containing that information but no documents that summarize the information in the format requested. You have three choices: 1) you can summarize the information and provide it; 2) you can inform the requestor that documents responsive to the request exist but no single document contains the information requested; or 3) you can provide the multiple documents that contain the information, with an explanation that no single document includes all requested information.

- c. FOIA also applies to documents that exist only on a computer, including email. Personal files, notes and phone logs are covered by FOIA as well.
- d. The 2017 amendments to FOIA expressly permit persons to request "an electronic transmission" of a public record. If the only version of the document is paper, you are not required to create an electronic version.

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<sup>16</sup> See 1981 S.C. Op. Atty. Gen. 38, Op. No. 81-20, 1981 WL96546 (SCAG) (concluding that FOIA did not require a county administrator to prepare and furnish a list of specific taxpayer information where the office did not maintain the information in that form).

If you produce documents electronically, you may not charge for copies as discussed on page 20.

- e. The 2017 amendments also added § 30-4-30(e), which provides that posting certain documents on the internet complies with FOIA:

A public body that places the records in a form that is both convenient and practical for use on a publicly available Internet website is deemed to be in compliance with the provisions of subsection (D), provided that the public body also shall produce documents pursuant to this section upon request.

- f. You are not obligated to acquire documents from other agencies in order to fully respond to a FOIA request. DPS is only required to provide documents in its possession or control. If DPS does not have the documents requested but you know where the documents are, tell the requestor.<sup>17</sup>
- g. A request to DPS is effective to request any documents at DPS or documents held for DPS by the Department of Archives and History. If you know that another section of SFAA has documents responsive to the request, forward a copy of the request promptly to that section.
- h. FOIA obligates the State to make non-exempt public records “available for inspection or copying.” Requestors usually want copies. However, FOIA does require such records be open for public inspection. SFAA’s general policy regarding FOIA requests expressly provides that “[n]on-SFAA employees shall not be allowed unsupervised access to SFAA premises or record files unless approved by the Office of the Executive

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<sup>17</sup> The Division of Procurement Services has long maintained that an evaluation panel is a “public body” as defined in § 30-4-20(a). The procurement officer effectively serves as chair of the panel, and maintains the official record of its deliberations in the procurement file. That record consists of the evaluators’ general instructions, non-disclosure and procurement integrity forms; their score sheets and explanatory comments; and the agenda and minutes of the panel’s meeting(s). Notes made by evaluators are not part of the procurement file, and we train our procurement officers not to collect those personal notes. They are, however, “public records” for purposes of FOIA. Procurement officers may not direct evaluators to destroy those records. You should tell them, though, that their notes are subject to disclosure pursuant to an appropriate request made under FOIA. If you receive such a request, you should promptly advise the evaluators and ask them to provide copies of any notes in their possession. You should provide to the requestor any documents you obtain from an evaluator that are responsive to the FOIA request and not subject to an exemption.

Director, office director, and/or designated staff.” It further provides that “[w]hile records are under review, staff should remain with the individual making the FOIA request.” *See* “SFAA News Media, FOIA, and Elected Official Requests Policy and Procedure” in Appendix VIII.D.

## 2. Who reviews the request

State personnel involved in an acquisition shall forward or refer all requests for information regarding the procurement to the responsible procurement officer before the issuance of an award or notification of intent to award, whichever is earlier. The procurement officer will review and respond to the request. Regulation 19-445.2010B.

- a. In some agencies, FOIA requests are handled by staff with agency-wide responsibility for FOIA requests. Contrary to this practice, Regulation 19-445.2010B, as previously stated, mandates that, prior to issuance of the initial award document, FOIA requests must be referred to the responsible procurement officer for a response.
- b. Likewise, § 11-35-410(F) requires that “the procurement officer shall . . . make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer.” While the procurement office may include support staff, both the Code and the Regulations require the involvement of the procurement officer, who may be the only person with access to all responsive documents, such as email, and who is trained regarding the special rules involved and knowledgeable of the competitive impact of releasing a particular document at a certain juncture in the procurement process.

## 3. How to review the request

- a. Read the request closely. Carefully consider how a request is worded and provide only what is requested.

For example, a request for “a copy of the procurement file” is different from a request for “a copy of any and all documents regarding the solicitation.” The latter is much broader.

- b. You must respond to the request as written, not as you think the requestor meant it to read. If you believe that the written request seeks more than the requestor meant to ask for, you can call and ask him or



her to withdraw his or her request and to substitute a narrower request in writing.

#### 4. What to Redact<sup>18</sup>

a. **From State-Created Documents** (documents created by someone other than competing vendors, such as notes of meetings, phone logs and e-mail):

- i. The Trade Secrets Act and Code Sections 11-35-410 and 11-35-1810 protect information, not documents. If restricted information has been repeated or recorded in your own documents, you must redact that information before releasing the document .<sup>19</sup>

For example, assume you send an e-mail to the using agency explaining why a promising vendor is non-responsive. The reason you found the vendor non-responsive involved information from the vendor's offer that she had marked as a trade secret. If you repeated any of the trade secret information in the e-mail, you must redact it before releasing the e-mail. *See* n.19, above.

- ii. Remove any material subject to mandatory withholding. The Mandatory Withholding List is included in Chapter 0 of this Guide and lists those types of documents that you must withhold. If you have concerns about releasing a certain document, ask legal counsel.

b. **From Non-Public Solicitations**

- i. Act No. 41 allows an agency to limit release of sensitive information in a solicitation to prospective offerors who sign a non-disclosure agreement. Section 11-35-410(E) provides:

A governmental body, with the approval of the appropriate chief procurement officer, may keep portions of a solicitation confidential and release the information to prospective offerors only upon execution of a

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<sup>18</sup> “Redact” means to edit out. The term is used as shorthand for editing out any information that must be removed before a document is released to another.

<sup>19</sup> As a general rule, you should not include information in an email message that is a trade secret, “privileged and confidential information,” as defined in § 11-35-410, or responsibility information furnished by a bidder or offeror, as described in § 11-35-1810. Once the message is sent you have no control how it may subsequently be distributed.

nondisclosure agreement, provided the information is otherwise exempted from disclosure by law.

Regulation 19-445.2010I implements the new statute.

ii. Since the information must be exempt from disclosure by law, you should release confidential sections of a solicitation only to persons who signed an NDA (prospective offerors who, presumably, have already obtained the information), or pursuant to the terms of a protective order issued by the Chief Procurement Officer or the Procurement Review Panel. Otherwise, withhold or redact the confidential matter.

c. **From Vendor-Created Documents** (documents or information provided by competing vendors, such as bids or proposals):

i. Do not release any information marked “confidential” or “trade secret” or “protected” without the express approval of either legal counsel or your supervisor.

Use common sense to review the documents requested. Normally, you should not release any information marked “confidential,” “trade secret” or “protected.” If information marked in this fashion is **obviously** not subject to protection, or if the entire bid or proposal has been marked as “confidential,” “trade secret” or “protected,” identify to your supervisor or to legal counsel exactly what information you believe must be disclosed even though the vendor has claimed protection.

ii. Remove any material subject to mandatory withholding as stated above.

d. **From Documents Protected by Confidentiality Provisions:**

If a contract results from the solicitation and includes a provision addressing confidentiality, the State **may** have a contractual obligation not to disclose any documents protected by the confidentiality provision. Regulation 19-445.2010G expressly recognizes this possibility:

Except as prohibited by law, and subject to section 2200, state contracts may include clauses restricting the State’s release of documents and information received from a

contractor if those documents are exempt from disclosure under applicable law.

Additionally, the State from time to time may enter a separate contract called a non-disclosure agreement, or NDA, with a vendor. Accordingly, consider whether the State has entered into a contract or NDA with the author of the documents requested and whether that contract contains a term regarding confidentiality. Such contractual obligations may be substantially limited by the State's obligation to comply with FOIA. Discuss this issue with legal counsel.

e. **From Copyrighted Materials:**

One or more of the requested documents may be marked as copyrighted materials. If a document is copyrighted, protection exists throughout the procurement and FOIA process. *See* the Copyright Addendum in Appendix VIII.E for further explanations and suggestions if you determine that some or all of the requested materials may be copyrighted.

5. How to Redact

a. **Method:**

If a sentence or paragraph has been edited out or one or more pages have been removed from a document, then the document has been redacted. When documents are redacted, you must leave some indication that something was taken out.

For example, if you pull three pages from a proposal before releasing it, your letter should indicate which pages were removed. Likewise, if you delete the last paragraph on a page before releasing the proposal, you must somehow communicate what was deleted. When less than an entire page is redacted, you can indicate the redaction different ways:

1. State what was redacted in your letter;
2. Mark out the redacted material with a black marker, such that the markings show up on copies; or
3. White out the redacted material and stamp or write the word "REDACTED" across the area deleted.

b. **How Much:**

Redact as little as possible. If the information for which protection is claimed is found in one sentence or paragraph, redact only that sentence or paragraph and release the remainder of the page. Of course, you can only be as specific as the vendor was in claiming protection.

**CAUTION:** Be very careful when relying on PDF software to accomplish redaction. Simply highlighting the text in the document with an opaque color does not remove the text. Anyone can copy the blacked-out language and paste it into a text editor, where it can be read. Newer software versions may include permanent redaction capability. If you aren't sure, remember that nothing works like a Sharpie and a copy machine.

6. Responsiveness Determination

According to the standard bidding instructions included with this Guide, the State may determine a bid or proposal nonresponsive if a portion of the bid or proposal is improperly marked as confidential or trade secret or protected.<sup>20</sup> See FOIA Bidding Instructions in Appendix C. **The better approach is to treat this type of noncompliance as a minor informality.** Use your judgment of the State's best interest and either require the Offeror to correct the minor informality [*i.e.*, re-mark their bid/proposal correctly] or waive the minor informality.

In exercising your judgment, consider the practical problem you create by not requiring correction. Suppose an offeror to a request for proposals has

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<sup>20</sup> See *Spotless Janitorial Services, Inc.*, B-295620, 2005 CPD ¶36, for a federal protest decision upholding the contracting officer's determination that a bid marked "confidential," "privileged," and "contains trade secrets," and purporting to restrict its disclosure pursuant to the federal Freedom of Information act, is non-responsive. While federal protest decisions are not binding precedent for Procurement Code protests, the Comptroller General's reasoning is pertinent:

Our Office has interpreted the requirement for a public opening to mean that the bid must publicly disclose the essential nature and type of products offered and those elements of the bid that relate to price, quantity, and delivery terms, since the purpose of publicly opening bids is to protect both the public interest and the bidders from any form of fraud, favoritism, or partiality, and to leave no room for suspicion. Therefore, we have held that restricting the disclosure of a bid renders it nonresponsive.

(citations omitted).

marked her pricing as a trade secret. You determine to waive as a minor informality and then submit the proposal to the evaluation panel, which scores that offer highest. Subsequently you request prior to award that the offeror remove the trade secret markings. She refuses. What can you do? If you declare the offer non-responsive at that point you may place the entire evaluation process in jeopardy, since you allowed the panel to evaluate and rank a non-responsive offer.<sup>21</sup> On the other hand, if you post an award statement, you may create a contractual obligation to respect the trade secret markings. How, then, will you publish the basis of the award (the contract price) without disclosing the contractor's "trade secret?"

If you waive or allow correction of the informality, Section 11-35-1520(13) requires you to document your action in writing. Any documentation to an Offeror that **accepts** a written correction should include the following statement:

Pursuant to section 11-35-1520(13), the State hereby accepts the corrections to your bid/proposal dated \_\_\_\_ which concerned the bidding instructions entitled "Disclosure of Your Bid / Proposal & Submitting Confidential Information." Any remaining noncompliance with the instructions for submitting confidential information is hereby waived as a minor informality. Neither the acceptance of this correction nor the waiver of any remaining noncompliance should be considered as an agreement by the State that you have properly marked your bid/proposal in accordance with the bidding instructions for Submitting Confidential Information.

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<sup>21</sup> *Appeals by ACT, Inc., and SC Budget & Control Bd.*, Panel Case Nos. 2014-16 and -17(iii).

Subsequently, the Panel held that responsiveness errors may be corrected after the initial ranking, if the corrections are re-submitted to the evaluators. *Appeal by Blue Cross and Blue Shield of South Carolina*, Panel Case No. 2019-2. The Blue Cross decision may be limited to its specific—and unusual—facts, so the safer route remains to require the offeror to correct any improper markings.

May 2020 revisions to the FOIA bidding instructions deleted clause no. 4030 (Submitting Redacted Offers) and expanded clause no. 2A125 (formerly titled “Submitting Confidential Information”). The revised clause is titled “Disclosure of Your Bid / Proposal & Submitting Confidential Data.” Requirements of old clause no. 4030 now appear in subparagraphs (c) and (d) of the new clause, and bolded text in subparagraph (a) makes clear that an unredacted proposal may be disclosed if no redacted version is submitted. *See* Appendix C.

7. At this point, you may skip to “Step #6” if:
  - a. You will be releasing the requested documents by the applicable deadline;
  - b. You will not be releasing any documents marked “trade secret,” “confidential” or “protected;” and
  - c. The scope of the request does not require you to bill for the costs of responding. *See* Step #4: Billing for Costs to determine.

Otherwise, go to Step #2.

### **B. Step 2: Acknowledge the Request**

If you will be responding to the request and releasing the appropriate documents within the applicable time frame, skip to Step #3.

If you will not be responding to the request and releasing the appropriate documents by the applicable deadline, you must notify the person making the request whether any documents will be withheld and, if so, why. *See* Form Letter #1 in Appendix VIII.B.

Then go to Step #3.

### **C. Step 3: Notify the Offeror**

1. If you are not releasing any documents marked “confidential,” “trade secret” or “protected,” skip to Step #4. Otherwise, follow the instructions below.
2. Before releasing documents marked as “confidential,” “trade secret” or “protected,” DPS will give the Offeror who authored the document advance notice of the release. If legal counsel or your supervisor has

authorized you to release such documents, send a “Notice” letter four business days before any documents are released. [You should not wait to release information that has not been marked.] *See* Form Letter #2 in Appendix VIII.B.

3. The notice letter should do the following:
  - a. Specify exactly what is being released;
    - i. Include copies of all “marked” documents that you will be releasing; and
    - ii. Include a copy of the FOIA request.
  - b. To distribute the notice letter, you should:
    - i. Email the notice and request confirmation of receipt;
    - ii. Fax the notice if possible and save the fax confirmation report; and
    - iii. Send the letter by both First Class and certified mail and retain your certified mail receipt.

Then go to Step #4.

#### **D. Step 4: Bill for Costs in Advance**

In its agency-wide policies and procedures, SFAA establishes guidelines for when you must bill for FOIA costs. Depending on the amount, costs for responding to a FOIA request may be waived, may be billed at the time the documents are released, or may be billed in advance.

If you estimate the cost of responding to a FOIA request is \$200 or more, then you must require a minimum deposit of 25% of the reasonably estimated cost, and you must request payment in advance. *See* “SFAA News Media, FOIA, and Elected Official Requests Policy and Procedure” in Appendix VIII.D.

1. If you will not be billing **in advance** for the cost of responding, skip to Step #5.
2. Otherwise, send a letter outlining our standard billing procedure, outlining the costs involved in responding to this FOIA request, and explaining that the information requested will be released after the charges have been paid. *See* Form Letter #3 in Appendix VIII.B.

3. **After receiving payment** , go to Step #6.

**E. Step 5: Notice for Costs (But Respond to Request)**

According to SFAA, you can waive (*i.e.*, not charge for) costs if the request will benefit the public interest and requires minimal and/or a reasonable amount of employee time. *See* “SFAA News Media, FOIA, and Elected Official Requests Policy and Procedure” in Appendix VIII.D.

1. Guidelines for when and what you should charge include:

- a. Photocopying: If the FOIA request requires copying approximately 50 pages or more, the charge is 20 cents per page.
- b. Staff time: If the request will require approximately **one hour or more** of staff time, the charge is based on the hourly wage of the employee(s) responding to the request. To determine your hourly wage, divide your annual gross salary by 2,080.<sup>22</sup> (This method is consistent with SFAA’s method for determining the hourly rate for paying State employees overtime.)

If you must hire a temporary worker to assist in responding to a FOIA request, you can bill that worker’s costs . However, you cannot bill the time legal counsel spends providing advice on a FOIA request .

- c. Postage: If postage expense of \$2.00 or more is required, the charge is the actual cost.
2. If you do not need to bill for the cost of responding (*i.e.*, the cost is nominal, or is waived), skip to Step #6.
3. Otherwise, send a notice outlining an estimate of the costs involved in responding to this FOIA request and requesting written or oral acceptance of the proposed charges. *See* Form Letter #4 in Appendix VIII.B. If the acceptance of costs is oral, make a record of the conversation for your FOIA file.

Then go to Step #6.

**F. Step 6: Respond to the Request**

1. Ask yourself the following questions:

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<sup>22</sup> 40 hours per week x 52 weeks per year = 2,080 hours per year.



- a. If appropriate, has the requestor made payment ?
  - b. If appropriate, has the requestor accepted the estimated costs ?
  - c. If appropriate, have four days passed since you sent the Notify Vendor letter ?
  - d. If appropriate, has the requestor returned the signed Copyright Certification ?
2. Then send a letter to the Requestor with copies of the documents requested. The letter should include a comprehensive list of all documents released and a list of any pages you did not release. *See* Form Letter #5 in Appendix VIII.B. If the requestor will be inspecting the documents instead of getting copies, confirm in writing the availability of the documents for inspection.

Your response may state you have withheld certain documents (for example, paragraphs #2B, C, or D of Form Letter #5). Occasionally the requestor will demand that you provide a list of all documents withheld and the reason for withholding them. Nothing in Regulation 19-445.2010 or FOIA requires that you do this.

3. Keep a record of all FOIA requests and your responses in the procurement/contract file.
4. Documents requested pursuant to FOIA should not be destroyed, archived, or returned to the vendor until 30 days after you have answered or denied the FOIA request. In addition, S.C. Code Ann. § 11-35-2430 may impose a separate obligation to maintain documents. Finally, you should determine if Agency (SFAA) or DPS document retention policy requires maintenance beyond the thirty-day period.

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## V. MANDATORY WITHHOLDING LIST

This Part 0 provides a list of the information required to be withheld at specific junctures. In addition, it addresses the legal foundation behind these requirements.

### A. Unopened Bids and Proposals

1. Bids and Proposals must be unopened and secure through the time of the bid opening. S.C. Code Ann. §§ 11-35-1520(4) and 11-35-1530(3).
2. If bids or proposals are rejected, or if a solicitation is cancelled after receiving offers, Reg. 19-445.2045C authorizes you to dispose of unopened bids or proposals. **This is a change to prior practice.** Regulations 19-445.2065D and 19-445.2097D, which required returning unopened bids or proposals to the offerors, have been repealed. You should dispose of those offers in a confidential manner (e.g., by shredding or securely deleting).

Just like prior practice, unopened bids are not public information under FOIA. Reg. 19-445.2045C. Since they never become public, the regulation directs you to dispose of unopened bids or proposals.

3. Note that Reg. 19-445.2045C requires you to retain *opened* bids and proposals in the procurement file, even if the solicitation is later canceled.

### B. Pre-Opening Identity of Bidders, Number of Bids, and Characteristics of Bid Samples

Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the state employees, and then only on a ‘need to know’ basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

Reg. 19-445.2045A.

### C. Pre-Opening: Identity & Number of RFQ Submittals

Prior to opening submittals received in response to a request for prequalification, the provisions of Regulation 19-445.2045 [stated directly above] shall apply to the receipt and safeguarding of submittals received.

Reg. 19-445.2132B.

### D. Pre- Intent-to-Award Identity of Offerors and Number of Proposals

Proposals and modifications shall be shown only to State personnel having a legitimate interest in them and then only on a 'need to know' basis. Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel.

Reg. 19-445.2095C(1), also applicable to competitive negotiations per Reg. 19-445.2099A(1).

Throughout the competitive sealed proposal process, state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.

Reg. 19-445.2010D.

**E. Pre- Intent-to-Award Source Selection Information**

Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer, **unless otherwise authorized in writing by the responsible procurement officer.** 'Source selection information' means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly: (1) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, (2) source selection plans, (3) technical evaluation plans, (4) technical evaluations of proposals, (5) cost or price evaluations of proposals, (6) information regarding which proposals are determined to be reasonably susceptible of being selected for award, (7) rankings of responses, proposals, or competitors, (8) reports, evaluations of source selection committees or evaluations panels, (9) other information based on a case by case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates.

Reg. 19-445.2010C (emphasis added).

***Documents described in paragraphs B through E are available only after an award or intent to award, whichever is earlier.***

**F. Information Supplied for a Determination of Responsibility**

1. S.C. Code Ann. § 11-35-1810(3) provides special protection to documents submitted with regard to a determination of responsibility by stating:

Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside the offices of the board, the Office of the Attorney General, or the purchasing agency without prior written consent by the bidder or offeror.

2. Documents relevant to a determination of responsibility should be released or withheld consistent with both the general instructions for Step #1 and the applicable bidding instructions. According to the bidding instructions included in this Guide (*see* Appendix VIII.C), vendors' claims to protection under § 11-35-1810 are waived with regard to any page of their response that isn't marked with the word "protected."

**G. Confidential Information Submitted During Negotiations**

[I]n no case may confidential information derived from proposals and negotiations submitted by competing offers be disclosed.

Section 11-35-1530(8) (competitive sealed proposals).<sup>23</sup>

In conducting negotiations, the procurement officer may not disclose confidential information derived from proposals submitted by competing offerors.

Section 11-35-1535(I)(3)(b)(v) (competitive negotiations).<sup>24</sup>

1. Neither section defines "confidential". The definition may not be limited to the definition of "privileged and confidential" found in § 11-35-410 and may encompass information that is "confidential" only during negotiations. Negotiations may encompass the entire period from bid opening to posting of the Notice of Intent to Award. This exemption is different from the one in § 30-4-40(a)(5)(c), because it may include information that is protected

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<sup>23</sup> *See also* R. 19-445.2095C(1) ("Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel.")

<sup>24</sup> *See also* Reg. 19-445.2099H(1)(k) ("Throughout the competitive negotiation process, state personnel shall not disclose the content of any offeror's proposal to any other offeror.")

for other reasons, like trade secrets. Unless the negotiation information is otherwise protected from disclosure, the prohibition expires at the conclusion of the acquisition process (generally marked by posting an award statement).

2. Section 11-35-410(F) waives the exemption in § 30-4-40(a)(5)(c) for “protest period” requests:

Without otherwise limiting any other exemptions granted by law, and except as provided herein, documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

3. Sensitive information given to the State during negotiations that an offeror believes is protected from disclosure should be marked in the same manner as it would be in the proposal, that is, “Confidential,” “Trade Secret,” or “Protected.” You should not disclose those portions of negotiation information that has been marked this way. See paragraph IV.A.4.c.i, above.

#### **H. Any Documents or Information Exempt from Disclosure by Statute**

Consult with buyers and program staff from the using agencies. Laws specific to the areas in which they work may contain special exemptions from FOIA. This may include documents subject to copyright protection which the agency will not copy (but will only provide for review).

## **VI. CHECKLISTS FOR RELEASING PARTICULAR DOCUMENTS**

The following checklists identify a number of different documents that may be available in the procurement file. For any given procurement, these documents may or may not exist and may be identified by some other name.

These checklists recommend when, with reference to a specific point in the procurement process, you should ordinarily release particular types of documents. These recommendations assume an ordinary procurement process. If you are addressing a FOIA request in an unusual procurement process, consult with your supervisor or legal counsel and explain the special circumstances. If you intend to release documents before these checklists recommend, consult with your supervisor or legal counsel.

### **A. Prior to Opening**

Prior to the Opening date, you may release the following information:

1. Justification for Procurement Method;
2. Determination for Use of a Multi-Term Contract Form;
3. Generic Evaluation Panel Briefing Instructions (without weightings not previously published);
4. Issued Solicitation Document in Final Form;
5. Issued Solicitation Amendment Documents; and
6. Approval to Use RFQ.

### **B. After Opening, Prior to Notice of Intent to Award**

After the Opening date but prior to the Notice of Intent to Award being issued, you may also release the following information:

1. Bid Tabulation (all solicitation types, except RFPs)

A final tabulation, including the application of preferences, may not be available until sometime after opening. Because the application of preferences may affect the ranking of bids, the original bid tab sheet may appear misleading. FOIA does not address this. If you think explaining this to the Requestor will be beneficial, feel free to do so.

2. RFQ Response List/Tabulation (after opening the associated solicitation) (all solicitation types, except RFPs)

3. IFB/RFQ Mailing List (list of vendors to whom IFB or RFQ documents have been mailed)
4. RFQ Submittals<sup>25</sup>/Selection & Ranking List (all solicitation types except RFPs)

### **C. After Notice of Intent to Award is Posted**

After the Notice of Intent to Award is posted (or after the Statement of Award if no Intent to Award is posted), you may release the following information:

- Tabulation of Proposals (RFP only)<sup>26</sup>
- Requisition (including attached specs, diskette, and any suggested vendors)
- Working Draft of Solicitation Document
- Correspondence/Email To and From Agencies Regarding Solicitation - *but see* Step 1 above because this depends on content and may differ for each document.
- Correspondence to Offerors Regarding Oral Presentations
- Conflict of Interest and Confidentiality Certifications
- Blank Evaluation Report (score sheet)
- Reference Checks - *but see* Step 1 above Regarding State-Created Documents since these documents can reflect customers' names, which may have been marked as confidential or trade secret.
- Panel Member/Evaluator's Score Sheet
- Summary of Evaluation Scores
- Pre-proposal/ Pre-Bid Attendance Roster<sup>27</sup>
- RFQ Submittals<sup>28</sup> / Selection & Ranking List (for RFP)
- RFP Mailing List (list of vendors to whom an RFP has been mailed)
- Determinations and Findings Form/Competitive Sealed Proposal Award
- Determination of Non-Responsiveness
- Agency Recommendation of Award

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<sup>25</sup> Reg. 19-445.2132B.

<sup>26</sup> Reg. 19-445.2095C(1) ("The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier.")

<sup>27</sup> A solicitation amendment should not publish an attendance roster or reveal the identity of any offerors.

<sup>28</sup> Reg. 19-445.2132B.



- Issued Statement of Award/Notice of Intent to Award
- Vendor Bids and Proposals/Responses to RFQ (redacted copy) - *but see* Step 1 because a modified approach may be needed for unusual procurements
- Clarification of Offers
  - Since documents concerning the clarification of bids are subject to disclosure, release these documents as you would a vendor's bid or proposal.
  - Clarification of any bid must be documented in writing by the procurement officer and must be included with the bid. S.C. Code § 11-35-1520(8). A similar rule appears to apply to clarification of a proposal. Reg. 19-445.2095E.
  - For correspondence from the procurement officer to an offeror, *see* What to Redact From State-Created Documents and What to Redact From Vendor-Created Documents in Chapter 0, Step #1 above.
- Documentation of Negotiations/Discussions
  - Reg. 19-445.2095I(2) requires a procurement officer, among other things, to:
    - Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;
    - Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
    - Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
    - Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.
  - All these documents may be responsive to a request to produce the procurement file.
  - Consider whether the communications regarding discussions and negotiations may themselves include information subject to an exemption that continues after intent to award.

- Certified Copies of Bonds - Release these documents as you would a vendor's bid or proposal
  - For construction related bonds, a certified copy<sup>29</sup> of a bond may be obtained from the using agency. S.C. Code Ann. § 11-35-3030(3)(b)
- Price/Cost Calculations for an RFP using Mathematical Formula
- Issued Post-Award Contract Change Orders
- Issued Post-Award Contract Modifications
- Bid Samples

#### **D. When Solicitation is Cancelled**

When a solicitation is cancelled before opening, no documents need to be disclosed under FOIA. Reg. 19-445.2045C provides that “Unopened bids or proposals are not considered to be public information under Chapter 4 of Title 30 (Freedom of Information Act.”<sup>30</sup> Regulations 19-445.2065D and 19-445.2097D, which required returning unopened bids or proposals to the vendors, have been repealed. You should dispose of unopened offers in a secure manner. See paragraph V.A.2, above.

If the solicitation is cancelled after opening but before award, and the State intends to resolicit the contract, all offers are exempt from disclosure until the notice of intent to award is issued in the revised or reissued solicitation. These offers are considered documents incidental to a proposed contractual relationship until the resolicitation process is complete. See § 30-4-40(a)(5). At that time, the old offers may be released according to the same guidelines applicable to any other vendor's offer.

If you do not plan to resolicit, retain opened offers in the procurement file. Reg. 19-445.2045C.

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<sup>29</sup> The phrase “certified copy” is defined as “[a] copy of a document or record, signed and certified as a true copy by the officer to whose custody the original is entrusted.” Black’s Law Dictionary 207 (5th ed. 1979).

<sup>30</sup> Reg. 19-445.2045 is made applicable to competitive sealed proposals by Reg. 19-445.2095C; and to competitive negotiations by Reg. 19-445.2099A(1).

## **VII. HANDLING OBJECTIONS**

### **A. By Requestor**

If a Requestor objects that he is entitled to more information than you produced, or contends he is entitled to information sooner than this procedure allows, discuss his objections with legal counsel. If a protest is pending, the Chief Procurement Officer or legal counsel may, consistent with FOIA and the Code, exercise discretion to release otherwise exempt material. In no case should you release information identified by the vendor as “confidential,” “trade secret” or “protected” without the approval of your supervisor or legal counsel.

### **B. By Vendor Whose Documents Are Being Released**

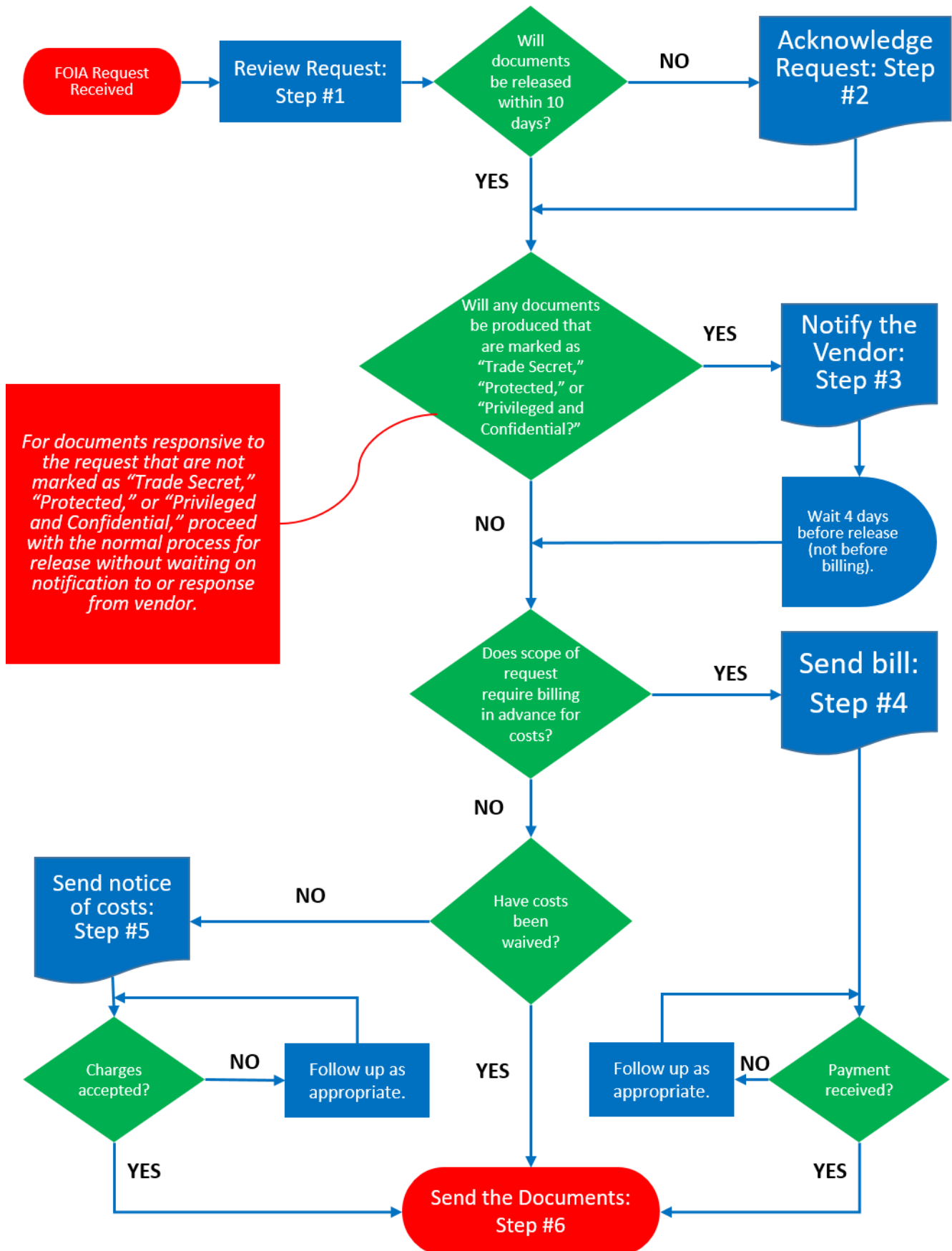
1. If a vendor objects to the release of material not marked “confidential,” “trade secret” or “protected,” the information will typically be disclosed notwithstanding the objection. Such objections can be referred to legal counsel; and
2. If a vendor responds to a notice letter by objecting to the release of material marked “confidential,” “trade secret” or “protected,” contact legal counsel.

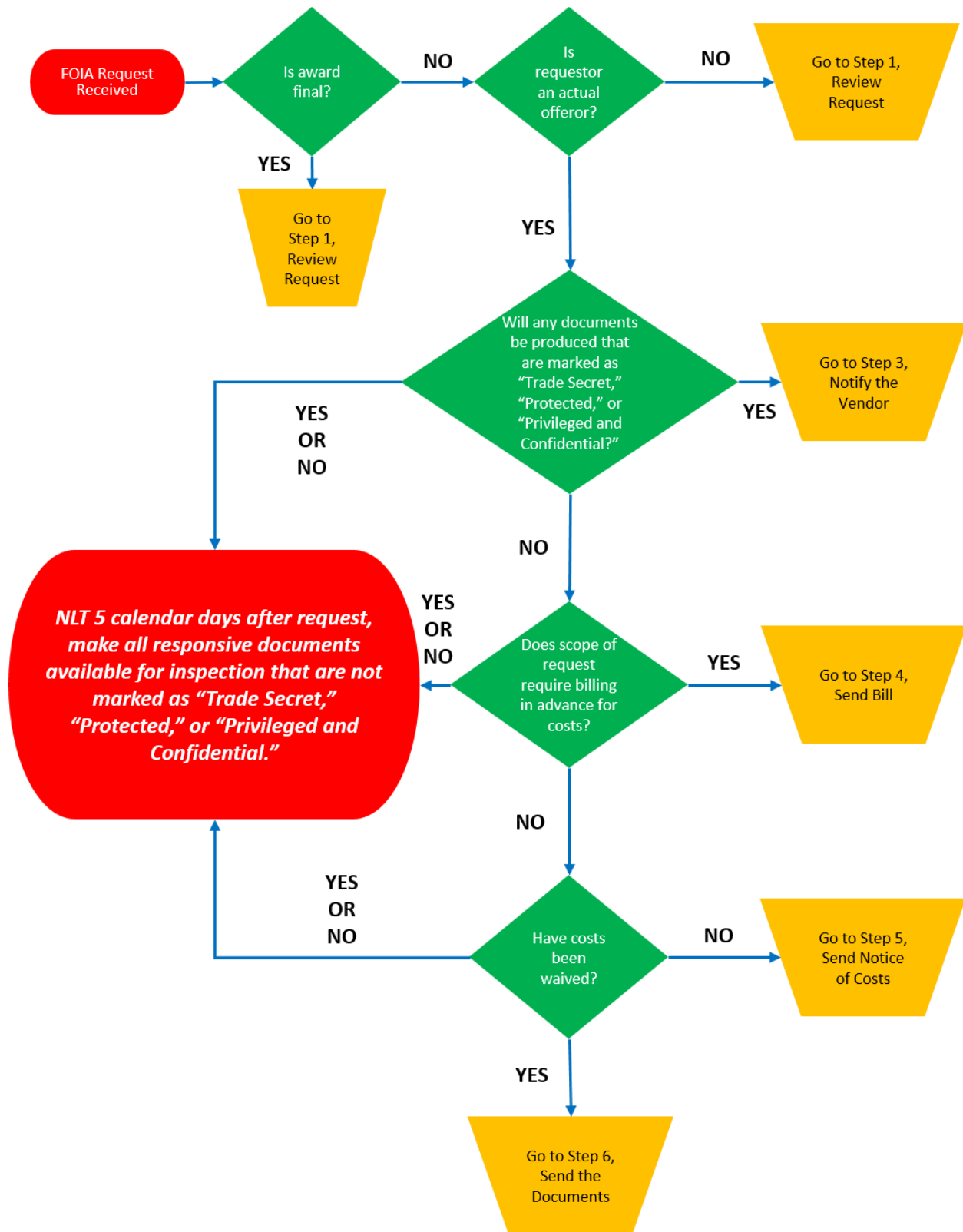
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## VIII. APPENDICES

### A. Flowcharts for Processing FOIA Requests.

On the next page is a flowchart referencing each of the six steps described in Chapter 0. Following that is another chart, illustrating the shortened timeframe for protest-related requests described in Chapter III. The yellow polygons indicate links to the steps in the first chart.





**B. FOIA Form Letters**

The following form letters address FOIA requests for information received by the State from a vendor during the procurement process. The forms should be modified to fit your particular situation and to address the type of information requested.



Form Letter #1 - Acknowledging the Request

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP # [Bid #]

Dear:

Our office has received your letter dated \_\_\_\_\_ requesting copies of \_\_\_\_\_ with regard to the above referenced solicitation. The release of public records is governed by the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.*, and by the Consolidated Procurement Code, S.C. Code Ann. § 11-35-410.

*[Explain the delay in making documents available, whether any documents will be withheld, and why documents are being withheld, e.g., (a) considered privileged and confidential under § 11-35-410, (b) considered a trade secret, (c) considered protected under § 11-35-1810, etc. and/or (d) are copyright protected documents under 17 U.S.C. § 101 et seq.]*

We currently anticipate making the documents you requested available, other than those exempt from disclosure or otherwise protected, by \_\_\_\_\_.

Form Letter #2 - Notifying the Vendor

TRANSMITTED VIA ELECTRONIC MAIL AND FACSIMILE: (999) 999-9999  
CERTIFIED U.S. MAIL # *(insert certified mail number)*

Re: URGENT NOTICE  
FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP # [Bid #]

Dear:

Our office has received a letter dated \_\_\_\_\_ requesting copies of documents you submitted to this office. Please find a copy of this letter enclosed.

As stated in the original solicitation, all offerors were required to mark as “confidential” or “trade secret” or “protected” only documents that met the relevant statutory definitions. Upon review, this office has determined that documents which are subject to disclosure have been improperly marked as “confidential” or “trade secret” or “protected.”

I am enclosing copies of any pages which were marked as “confidential” or “trade secret” or “protected” by your business but which we will be releasing. This material will be released four days from the date of this letter. In addition, we will be releasing any pages from the documents listed below that were not marked as “confidential or “trade secret” or “protected.” You may pursue any available legal options you have to prevent disclosure.

*[Letter should include a comprehensive list of all documents you will be releasing and a copy of every page we intend to release that the vendor marked as “confidential” or “trade secret” or “protected.”]*

Form Letter #3 - Billing for Costs

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP # [Bid #]

Dear:

Our office has completed its review of your request. If your request involved copying more than fifty pages, we have billed you \$.20 per page for the cost of copying. If our staff spent more than one hour responding to your request, we have billed you for the staff time involved. If any other costs, including postage, amounted to \$2.00 or more, we have billed you for our actual costs.

The costs involved in responding to your request are as follows:

Copy Costs:	_____	x \$0.20 per page =	_____
Staff Time:	_____	x \$____ per hour =	_____
Other Costs/ Postage:	_____		_____
		Total	=====

Checks should be made payable to the *State Fiscal Accountability Authority*. Your payment should be mailed to the attention of \_\_\_\_\_, at the address appearing in the letterhead. Once payment is received, we will send you the documents available.

Form Letter #4 - Notice of Costs

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP # [Bid #]

Dear:

Our office has reviewed your request for documents. A rough estimate of the cost to complete your request is \$ \_\_\_\_\_. A breakdown of the estimated cost follows. Once this office receives your oral or written agreement to pay for the actual cost we incur, your request will be filled.

The estimated costs involved in responding to your request are as follows:

Copy Costs:	_____	x \$0.20 per page =	_____
Staff Time:	_____	x \$___.__ per hour =	_____
Other Costs/ Postage:	_____		_____
		Total	=====
			_____

## Form Letter #5 - Responding to the Request

Re: FOIA Request by *Acme, Inc.* dated *January 1, 2001*  
RFP # [Bid #]

Dear:

### **Paragraph #1 - Introduction**

Our office has received your letter dated \_\_\_\_\_ requesting copies of \_\_\_\_\_ with regard to the above referenced solicitation. Our release of public records is governed by the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.*, and by provisions of the Consolidated Procurement Code, specifically including but not limited to S.C. Code Ann. § 11-35-410.

### **Paragraph #2 - Body**

*Choose among the following paragraphs, as appropriate. Letter should include a comprehensive list of all documents released. Letter should also include a list of all documents, pages, or portions of them, that have not been released. The file must clearly reflect which documents were not released.*

*Choice A*

Enclosed are the documents you requested.

*Choice B*

Enclosed are the documents you requested. Documents exempt from disclosure or otherwise protected have been withheld.

*Choice C - Prior to Opening*

At this stage of the procurement process, only certain documents are available for public review. I have enclosed all the documents you requested that are currently available. Additional information will become available at the opening, and then again after a Notice of Intent to Award has been posted. Please let us know in writing if you would like us to contact you with regard to your request once the Notice has been posted.

*Choice D - After Opening, Prior to Posting Notice of Intent to Award*

At this stage of the procurement process, only certain documents are currently available. I have enclosed all the documents you requested that are currently available. After a Notice of Intent to Award has been posted, additional information will be

available. Please let us know in writing if you would like us to contact you with regard to your request once the Notice has been posted.

*Choice E – Copyrighted Documents*

Some of the documents you have requested appear to be protected by a copyright. Enclosed is a form for you to complete and return to permit this office to provide you with copies of those documents. *[Send the Certification Form, Appendix F, and list all protected documents on the form. You should produce, without waiting for a signed certification form, any documents, otherwise responsive to the request and not subject to withholding, that are not copyright-protected]*

**Paragraph #3 - Billing**

The costs involved in responding to your request are as follows:

Copy Costs:	_____	x \$0.20 per page =	_____
Staff Time:	_____	x \$____ per hour =	_____
Other Costs/ Postage:	_____		_____
		Total	=====

Checks should be made payable to the *State Fiscal Accountability Authority*. Your payment should be mailed to the attention of \_\_\_\_\_, at the address appearing on the letterhead.

**Final Paragraph - Privacy Act Information**

Section 30-2-50 of the Code of Laws of the State of South Carolina provides that no person or private entity shall knowingly obtain or use any personal information obtained from a public body for any commercial solicitation directed to a person in this State. The South Carolina State Fiscal Accountability Authority, as a public entity, gives notice to you, as a requestor of records from this agency, that obtaining or using these public records for commercial solicitation is prohibited. Any person who knowingly uses public records for commercial solicitation is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. Please see S.C. Code of Laws Section 30-2-10, *et seq.*, for full text of Family Privacy Protection Act.

## C. FOIA Bidding Instructions

### DISCLOSURE OF YOUR BID / PROPOSAL & SUBMITTING CONFIDENTIAL DATA (JUN 2020)

(a) According to Section 11-35-410, any person submitting a document in response or with regard to any solicitation or other request must “comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.”

**IF YOU IDENTIFY YOUR ENTIRE RESPONSE AS EXEMPT FROM PUBLIC DISCLOSURE, OR IF YOU DO NOT SUBMIT A REDACTED COPY AS REQUIRED, THE STATE MAY, IN ITS SOLE DISCRETION, DETERMINE YOUR BID OR PROPOSAL NONRESPONSIVE AND INELIGIBLE FOR AWARD.**

(b) By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page, or portion thereof, of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page, or portion thereof, was redacted and conspicuously marked “Trade Secret” or “Confidential” or “Protected”, (2) agrees that any information not redacted and marked, as required by these bidding instructions, as a “Trade Secret” is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure.

(c) If your offer includes any information that you claim is exempt from public disclosure, you must submit one complete copy of your offer from which you have removed or concealed such information (the redacted copy). Except for the information removed or concealed, the redacted copy must be identical to your original offer.

(d) Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected. If only portions of a page are subject to some protection, do not redact the entire page. The redacted copy must reflect the same pagination as the original and show the empty space from which information was redacted. The Procurement Officer must be able to view, search, copy and print the redacted copy without a password. If your response, or any part thereof, is improperly marked as

confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive.

(e) On the redacted copy, you must identify the basis of your claim by marking each redaction as follows: You must separately mark with the word “CONFIDENTIAL” every page, or portion thereof, that you redacted and claim as exempt from public disclosure because it is either (1) a trade secret as defined in Section 30-4-40(a)(1) of the Freedom of Information Act, or (2) privileged and confidential, as that phrase is used in Section 11-35-410. You must separately mark with the words “TRADE SECRET” every page, or portion thereof, that you redacted and claim as exempt from public disclosure as a trade secret pursuant to Section 39-8-20 of the Trade Secrets Act. You must separately mark with the word “PROTECTED” every page, or portion thereof, that you redacted and claim as exempt from public disclosure pursuant to Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text.

(f) In determining whether to release documents, the State will detrimentally rely on your redaction and marking of documents, as required by these bidding instructions, as being either “Confidential” or “Trade Secret” or “Protected”. By submitting a response, you agree to defend, indemnify and hold harmless the State of South Carolina, its agencies, officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney’s fees, arising out of or resulting from withholding information by the State of South Carolina or any of its agencies, that you have redacted or marked as “Confidential” or “Trade Secret” or “Protected”. (All references to S.C. Code of Laws.) [02-2A125-3]



**D. South Carolina State Fiscal Accountability Authority News Media,  
FOIA, and Elected Official Requests Policy and Procedure**

**SOUTH CAROLINA STATE FISCAL ACCOUNTABILITY AUTHORITY  
NEWS MEDIA, FOIA, AND ELECTED OFFICIAL REQUESTS  
POLICY AND PROCEDURE**

**THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE AGENCY. THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS. THE AGENCY RESERVES THE RIGHT TO REVISE THE CONTENTS OF THIS DOCUMENT, IN WHOLE OR IN PART. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE TERMS OF THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT.**

**I. Policy Statement**

The State Fiscal Accountability Authority (SFAA) plays a key role in central state government and is often critically involved in a wide range of issues that face the state. It is critical to SFAA's mission that the news media, public, and elected officials receive timely and accurate information about the activities of SFAA. The responsibility for providing information to these entities rests with the Office of the Executive Director and those individuals within the offices who are so designated.

This policy applies to you in your official capacity as an employee of SFAA. This policy does not prohibit an employee from exercising his or her freedom of speech as a private citizen on matters of public concern.

Employees of SFAA are instructed to use extreme care to avoid disclosing any confidential or nonpublic information.

**II. News Media**

**A. General Procedures**

Employees of the State Fiscal Accountability Authority should refer the news media to the Communications Officer in the Office of the Executive Director.

It is the responsibility of the Communications Officer, in conjunction with the Office of the Executive Director and division/office directors, to determine who will provide information directly to the news media on individual issues.

Division/office directors will be notified of non-routine requests for information from their divisions/offices; routine requests will be handled in the ordinary course of business as determined by the Communications Officer.

If the Communications Officer is unavailable, employees should refer the news media to the Communications Coordinator in the Office of the Executive Director. When neither the Communications Officer nor the Communications Coordinator is available, employees should refer the news media to their division/office director.

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Employees should immediately report all news media contact their supervisor, division/office director, and Communications Officer as soon as possible.

Employees must promptly respond to requests from the Communications Officer for information and/or access to SFAA offices.

**B. Interviews**

All employee interviews with the news media should be arranged through the Communications Officer. This includes both print and broadcast media interviews via telephone or in person.

Interviews of a personal nature (i.e., not related to job function or employee responsibilities) should not be conducted in any SFAA office/building at any time unless specific, prior permission has been granted by the Communications Officer and/or the Communications Coordinator in the Office of the Executive Director.

*Exceptions:*

Occasionally, executive staff or a designee will be in a position to talk directly with the news media. Executive staff is defined as one of the following: executive director, Authority Secretary, division director, and office director.

Executive staff should carefully consider the appropriateness of such direct contacts with the news media, bearing in mind that these discretionary decisions will vary from issue to issue. Sensitive matters affecting the SFAA and its offices should always be referred to the Communications Officer and/or Communications Coordinator in the Office of the Executive Director.

After contact with the news media, the division/office director and/or executive staff should notify the Communications Officer immediately as to the subject matter and details thereof.

**III. Freedom of Information Act (FOIA) Requests**

**A. General Procedures**

All FOIA requests shall be answered in accordance with the Freedom of Information Act (FOIA), including but not limited to time frames, definitions of releasable information, and exemptions. Records exempt from disclosure under the FOIA will not be released without prior approval. See Sections 30-4-10 et seq. of the *South Carolina Code of Laws* (1976) as amended.

On matters which are questionable as to disclosure, the Office of General Counsel should be consulted prior to taking action on the request.

Non-SFAA employees shall not be allowed unsupervised access to SFAA premises or records unless approved by the Office of the Executive Director, division/office director, and/or designated staff.

If a records request regards a public entity, officer, or official, they should be informed of the records release promptly and prior to the release of records. This action should in no way be construed as circumvention of the FOIA or compromising SFAA's intention to disclose information which is releasable under the FOIA.

#### B. FOIA Requests from News Media

News media requests under FOIA should be referred to the Communications Officer in the Office of the Executive Director.

It is the responsibility of the Communications Officer, in conjunction with the Office of the Executive Director and office/division directors, to determine who will provide FOIA information directly to the news media. FOIA requests and responses must be in writing. A cover letter or message should be part of the FOIA response.

As needed, the Communications Officer will request information from the appropriate SFAA office. This includes but is not limited to researching files, pulling archived materials, copying information, running, and if necessary, developing a computerized report, making records available for review, and allowing file access to reporters.

It is the policy of the State Fiscal Accountability Authority to answer all FOIA requests in a timely manner. While requests should be handled in the course of regular office business, an initial response must be provided no later than the 10 business days (excluding Saturdays, Sundays, and legal holidays) as provided for in the Act. If the requested record is more than 24 months old on the date the request is made, the SFAA has 20 business days (excluding Saturdays, Sundays, and legal holidays) as provided for in the Act to respond, or earlier if possible. Time limits for providing the requested records are addressed in section III.C below.

When requests involve a large amount of information, requestors should be given options for receiving the data. This could include allowing the requestor the opportunity to review disclosable records at our offices rather than receiving hard or electronic copies if this will be more convenient for both parties. This step should be taken before SFAA staff begins assembling the data. While records are being physically inspected, staff should remain with the individual making the FOIA request.

If information requested under the FOIA is determined to be exempt from disclosure, the Office of the Executive Director and/or office executive staff through the Communications Officer shall provide written notification of that determination and the reasons thereof within the time requirements of the FOIA (i.e., 10 business days if the requested record is less than 24 months old or 20 business days if the requested record is more than 24 months old, excluding Saturdays, Sundays, and legal holidays).

All FOIA requests from the news media should be date stamped upon their receipt; if the FOIA request is received initially at a SFAA office, it should be date stamped at that location and immediately redirected to the Office of the Executive Director to the Communications Coordinator where it will be date stamped also.

FOIA responses may be in paper or electronic format. The requested records must be produced in electronic format if electronic format is requested and the public records already exist in an electronic format.

A FOIA request is not required for information that is immediately disclosable under the Act. This would include approved minutes of Budget and Control Board/State Fiscal Accountability Authority meetings and other Authorities or public bodies for which SFAA provides staff support.

No SFAA office, program or SFAA employee acting in their official capacity should submit a FOIA request to another governmental entity without prior approval of the Office of Executive Director.

***The following text should be included in all responses to FOIA requests:***

**“Section 30-2-50 of the Code of Laws of the State of South Carolina provides that no person or private entity shall knowingly obtain or use any personal information obtained from a public body for any commercial solicitation directed to a person in this State. The State Fiscal Accountability Authority, as a public entity, gives notice to you, as a requestor of records from this agency, that obtaining or using these public records for commercial solicitation is prohibited. Any person who knowingly uses public records for commercial solicitation is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. Please see S.C. Code of Laws Section 30-2-10, et. seq. for full text of Family Privacy Protection Act.”**

- C. Time to Furnish Records
  - 1. Records must be furnished or made available for inspection or copying no later than 30 calendar days from the date on which the final determination was provided, unless the records are more than 24 months old, in which case the records must be provided no later than 35 calendar days from the date on which the final determination was provided.

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- a. Procurement Services will continue to honor the accelerated deadlines appearing in Regulation 19-445.2010(A): "If requested in writing by an actual offeror prior to final award, the responsible procurement officer shall, within 10 days of the receipt of any such request, make documents directly related to the procurement activity not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer."
2. If a deposit is required by the agency, the record must be furnished no later than 30 calendar days from the date on which the deposit is received, unless the records are more than 24 months old, in which case the records must be provided no later than 35 calendar days from the date on which the deposit was received to fulfill the request.

D. FOIA Requests from Non-News Media

FOIA requests originating with non-news media (i.e., vendors, attorneys, businesses, organizations, general public, etc.) which concern non-sensitive issues should be answered by the office to which it is directed or is applicable.

To the extent applicable, procedures for FOIA requests from non-news media should be identical to the FOIA procedures regarding the news media; provided, however, that the Division of Procurement Services should follow its internal operating procedures regarding FOIA document requests.

FOIA requests originating from non-news media which concern sensitive matters or issues of interest to SFAA members and/or the Executive Director should be directed to the Communications Officer immediately.

E. Disclosure of Applicant Information

1. Introduction

In accordance with South Carolina's Freedom of Information Act ("FOIA"), S. C. Code § 30-4-10 et. seq. as amended, public bodies must make available to a requestor under the FOIA the total number of applicants who applied for a specific employment position. In addition, public bodies must disclose all materials gathered during the employment search for not fewer than the final three applicants under consideration for any type of position.

2. Collection of Applicant Information

The following steps are to facilitate the processing of a FOIA request before it is received:

a. Creation of a Centralized Office To Process FOIA Requests

The SFAA's Office of Human Resources is designated as the centralized office to process FOIA requests concerning applicant information. The Office of Human Resources is the designated custodian which will store all of this applicant information. The Office of Human Resources will receive all FOIA requests for applicant information within the agency and be responsible for all correspondence to and from the agency regarding those FOIA requests.

b. Determining the Total Number of Applicants for a Position

The SFAA's Office of Human Resources shall maintain a current count of the number of applications that are accepted for an open position. Once the position is filled or applications are no longer being accepted for that position, the applications shall be grouped together, with the total number of applications accepted displayed clearly on an applicant log and maintained in the file folder in which the applications are kept.

c. Standard Materials to Gather Concerning an Applicant

The following is a list of materials that generally should be gathered for an applicant: application/resume, reference checks, and confirmation of salary for a State employee. Standardized information that must become part of the applicant's file shall be determined by the nature of the position.

d. Materials that May Be Gathered concerning an Applicant

The following is a list of some materials to gather, dependent upon the specific position being filled: criminal background checks, credit checks, school transcripts, driver's license records, drug tests (including mandatory CDL drug testing), medical examinations, certification or licensing verifications, proficiency test scores (e.g., excel, powerpoint, etc.), writing samples, and interview notes.

e. Determining Not Fewer than the Final Three Applicants for a Position

Once all applications have been gathered for a position and all interviews have been completed, the hiring office/ division must identify not fewer than the final three applicants for the position and notify the SFAA's Office of Human Resources on the Applicant Log form as to that identification.

3. FOIA Request for Applicant Information

The following steps are to facilitate the processing of an FOIA request once it is received.



a. Requiring a Written Request for Information

The SFAA's Office of Human Resources will require all requests for information concerning applicants to be in writing.

b. Providing a Written Response to the Request

When the SFAA's Office of Human Resources receives a written request under the FOIA for information concerning an applicant, the Office of Human Resources will respond in writing to the request within the timeframes provided in section III.B. Information in the response should include a summary of any information that will be provided under the request, a summary of any information that will not be disclosed and the reasons therefore, an estimate of the fees that will be charged, and any deposit, if necessary, to be made by the requestor.

c. Assembling Information to Respond to the Request

The SFAA's Office of Human Resources will assemble all materials, regardless of their form or location, that were gathered in the search to fill the employment position.

d. Determining Which Information to Disclose

The SFAA's Office of Human Resources will determine which information to disclose under the FOIA request. The applicant's social security number, medical records, and tax information are exempt from disclosure by the FOIA. Each FOIA request will be examined on a case-by-case basis for determining which information will be disclosed or not disclosed under the Freedom of Information Act. In determining what information to disclose under §30-4-40(a)(2) of the FOIA, the Office of Human Resources should weigh the privacy interests of the applicant against the public's interest in disclosure. Depending on the specific situation, the following information should be evaluated to determine whether its disclosure would constitute an unreasonable invasion of personal privacy under § 30-4-40(a)(2): drug test results, academic transcripts, unlisted phone numbers, salaries, criminal convictions, Family Independence Act (FIA) information, reasons for job terminations, credit check information, criminal background check information, reference letters, disability status, and driver's license numbers and records. Prior to the release of any information under this Policy, the Office of General Counsel will be consulted.

F. Charges for FOIA Requests

FOIA requests should be answered without charge when the request will benefit the public interest and requires minimal and/or a reasonable amount of employee time and photocopying expense.

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For requests which require substantial employee time for searching and/or photocopying, etc., a reasonable charge may be assessed the person or organization requesting the information. FOIA requests which involve computer programs/runs will also be assessed a reasonable charge.

Guidelines for determining what is reasonable are established for all SFAA offices as follows:

Photocopying - if the FOIA request requires copying 50 pages, the charge would be calculated at 20 cents per page.

Employee/Administrative Time - if the FOIA request requires one hour or more of staff time, the charge would be based on the hourly wage of the lowest paid employee with the necessary skill and training to perform the request. The agency can charge for the employee time involved in searching for records, retrieving records, redacting records, and transferring records to electronic format.

Postage or Fax - if the FOIA request requires postage or a fax expense of \$2.00 or more, the charge would be the actual cost associated with the process.

Computer Time - if the FOIA request requires development of a computer program or running an established program, the charge would be based on costs associated with the process.

Charges may be assessed for both photocopying and employee/administrative time if considerable staff time and any amount of photocopying are required to process the FOIA response. Copy charges may not be assessed for records that are transmitted in an electronic format. If records are not in electronic format, the agency has the option to produce them in electronic format

Charges may also be assessed if one or more related FOIA requests from the same individual or organization require considerable staff time to answer.

Any individual making a FOIA request which will result in a charge shall be notified in advance of the approximate cost for providing that information; notification and acceptance of those charges may be verbal or in writing.

A deposit not to exceed 25% of the total reasonably anticipated (estimated) cost for reproduction of the records may be required prior to the public body searching for or making copies of records. If the cost of responding to the request is estimated to be \$200 or more, then a minimum deposit of 25% of the reasonably estimated cost must be required prior to searching for or making copies of the records. Requests for payment in advance shall be in writing. The full amount of the total cost must be paid at the time of the production of the request and before the records are released.

Payment for FOIA requests should be made payable to the State Fiscal Accountability Authority. Checks/money orders should be forwarded to the Finance Office. Payment will be deposited and credited to the office which provided the response to the FOIA request.

Constitutional officers, members of the General Assembly, and other state agencies shall not be charged for information or records.

Charges may be waived or levied at the discretion of the Communications Officer or division/office director.

#### **IV. Requests from Elected Officials**

##### **A. General Procedures**

Employees of SFAA should refer public records requests from elected officials or their staff to the Communications Officer in the Office of the Executive Director.

It is the responsibility of the Communications Officer, in conjunction with the Office of the Executive Director and division/office directors, to determine who will provide records responsive to the request.

Division/office directors will be notified of non-routine requests for records from their offices/divisions; routine requests which are non-controversial will be handled in the ordinary course as determined by the Communications Officer.

If the Communications Officer is unavailable, employees should refer the legislative requests to their office/division director and/or the Office of the Executive Director.

Employees should respond to requests from the Communications Officer for information and/or access to SFAA offices in a reasonable time frame.

## E. Copyright Addendum

17 U.S.C. § 101, *et seq.*

Copyright protects “original works of authorship” that are fixed in a tangible form of expression. The fixation need not be directly perceptible so long as it may be communicated with the aid of a machine or device. Copyrightable works include the following categories:

1. literary works;
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
7. sound recordings; and
8. architectural works.

17 U.S.C.A. § 102(a). However, this copyright protection for an original work does not extend to any idea, procedure, process, system, method of operation, concept, principle or discovery. 17 U.S.C.A. § 102(b).

Subject to certain limitations found in sections 107 through 122 of the Copyright Act (Act), the owner of copyright has exclusive rights to reproduce or to authorize others to reproduce the work in copies. U.S.C.A. § 106(a). One of the most important limitations is the doctrine of “fair use.”

“Fair use” is a defense and means that if use of the material was “fair”, then no permission had to be sought or granted. Section 107 of the Act lists certain purposes considered “fair” including criticism, comment, news reporting, teaching, scholarship and research. However, there are generally four factors used to determine whether the copying of a work is “fair”:

1. The Purpose and Character of the Use

Is the work being copied for a commercial use or to generate a profit or is it being copied to educate, inform or for the purpose of commentary or criticism? If it is the latter, it is “fair use.” This is probably the single most important factor.

## 2. The Nature of the Copyrighted Work

Was the work created as a piece of art, literary or graphic, or is it a document or photograph which is of no particular intrinsic value such as a bill of lading or a shipping form or a brochure in common use and with common availability? If it is the former, then it may be subject to a copyright.

## 3. The Amount and Suitability of the Use

Is the copy a duplicate of the original or has it been reduced in size or otherwise altered for a specific and limited purpose? It has long been recognized that a commentator (copier) may fairly reproduce as much of the original, copyrighted work as is necessary to his proper purpose. Thus, if full reproduction is necessary for that purpose and the purpose is fair, the work may be copied in its entirety as often as necessary.

## 4. The Effect of the Use on the Potential Market

Will the copying of the work cause the copyright holder any harm by lessening sales of the work in the market for the work? If the copying of the work will not materially affect the marketability for the work, then its use is fair. *See* 17 U.S.C.A. § 107.

The distinction between “fair use” and infringement may be unclear and not easily defined. There is no single test that fits all; each situation is judged on its own facts. Generally speaking, the copying of a document by the State to comply with an FOIA request will be a fair use. This is largely because the State does not seek to profit from the copying but instead intends only to inform, educate and advise.

Since there is no specific number of words, lines or notes that may safely be taken without permission, the safest course is to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission. When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of “fair use” would clearly apply to the situation. Remember that acknowledging the source of the copyrighted material does not substitute for obtaining permission. If there is any doubt, consult legal counsel.

**F. Copyright Certification**

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**CERTIFICATION**

I, \_\_\_\_\_ of \_\_\_\_\_ ,  
Name of FOIA Requestor Street Address

\_\_\_\_\_, \_\_\_\_\_, have requested that the South Carolina  
City State

State Fiscal Accountability Authority provide me, pursuant to the South Carolina Freedom of Information Act, copies of the following documents which may be protected under the copyright laws of the United States [17 U.S.C. § 101 *et seq.*]:

**LIST OF DOCUMENTS/WORKS**

I certify that I either have permission of the copyright holder to make copies of the materials listed above or that it is my intention to make only “fair use” of the copies pursuant to 17 U.S.C. § 107 and I accept full responsibility pursuant thereto and agree to indemnify and hold the State Fiscal Accountability Authority harmless for any costs, damages or attorney’s fees pursuant to their provision of the requested copies.

\_\_\_\_\_  
Signature

Date: \_\_\_\_\_