

Freedom of Information Act (FOIA) & Procurement

October 27, 2023



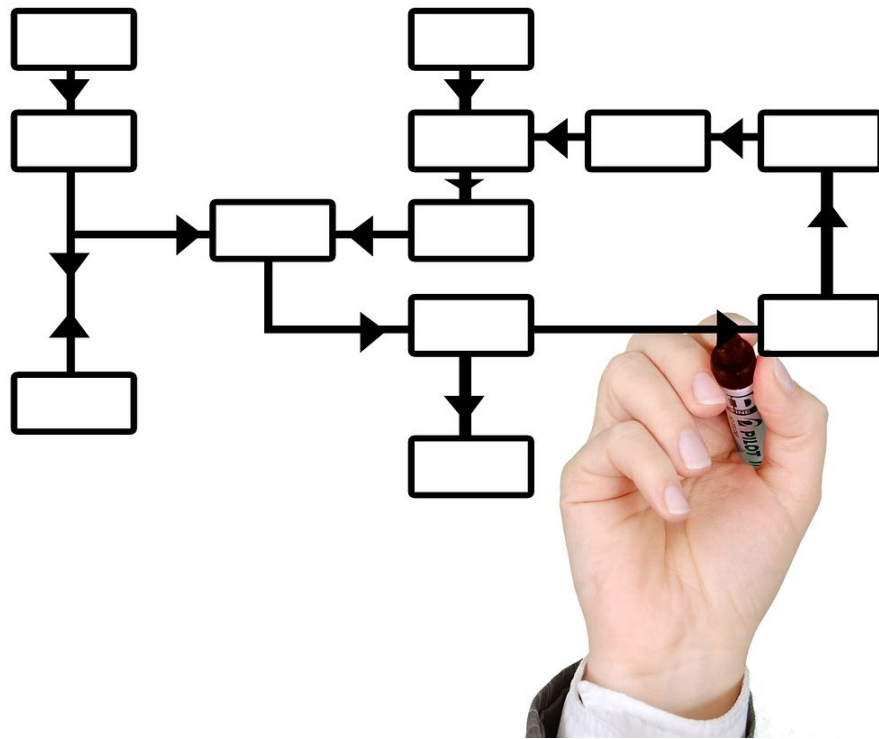
You want to
know what?

Public Records Laws

- ▶ Chapter 4, Title 30
The Freedom of
Information Act (FOIA)
- ▶ Procurement Code -
Section 11-35-410



I've gotten a request, What do I do?



- ▶ Review the Request
- ▶ Acknowledge the Request
- ▶ Notify the Offeror, if necessary
- ▶ Bill for Costs in Advance or Notice for Costs, if necessary
- ▶ Respond to the Request



Review the Request

- ▶ Nature of the written request
- ▶ Requestor
- ▶ Are documents publicly available?
- ▶ Age of the documents
- ▶ Are these documents that should be withheld?

Procurement Withholding List

- ▶ Unopened Bids & Proposals
- ▶ Information Supplied for Determination of Responsibility
- ▶ Confidential Information submitted in Offer or during negotiations
- ▶ Documents or Information exempt from disclosure by Statute



Withheld prior to Award or Intent to Award

- ▶ Pre-opening Identity of Bidders, Number of Bids, and Characteristics of Bid Samples
- ▶ Pre-opening Identity & Number of RFQ Submittals
- ▶ Pre-Intent to Award Identity of Offerors and Number of Proposals
- ▶ Pre-Intent to Award Source Selection Information





What is not public information? - FOIA

- ▶ Definition of Public Record under FOIA - 30-4-20 (c)
- ▶ Exempt from Disclosure (30-4-40)
 - ▶ Trade Secrets
 - ▶ Information of a personal nature
 - ▶ Documents of proposed contractual arrangements (become available once a contract is entered)

What is not public information? Procurement Code

- ▶ Section 11-35-410 (B)
 - ▶ Privileged and confidential information - where the release may cause harm to the competitive position of the vendor
- ▶ Regulation 19-445.2010
 - ▶ Information is confidential prior to issuance of award or intent to award
 - ▶ Non-disclosure agreements must be signed prior to releasing RFP responses
 - ▶ Non-public solicitations



Redaction

- ▶ Request vendors to redact their offers
- ▶ The entire proposal may not be redacted
- ▶ 11-35-410 (D) - “Information not marked as required by the applicable instructions may be disclosed to the public”
- ▶ State must redact any State-created documents
- ▶ When redacting - make sure the information is not visible



What if I don't have the documents?

- ▶ Section 30-4-30 (A)(2)
 - ▶ “A public body is not required to create an electronic version of a public record when one does not exist to fulfill a records request”
- ▶ Refer the requestor to the appropriate agency, if you know the records are held by a different agency.
 - ▶ Do not forward a FOIA request to another agency

Acknowledging the Request

- ▶ Should include:
 - ▶ Explanation of any documents will be withheld and why
 - ▶ Notice of any FOIA costs
 - ▶ Explanation of any delay in making documents available
 - ▶ Provide a date when the documents will be provided



FOIA Response Times

- ▶ Acknowledgement
 - ▶ Ten (10) business days if the requested documents are less than 24 months old.
 - ▶ Twenty (20) business days if the documents are over 24 months old
- ▶ Furnishing the records or making them available for inspection or copying
 - ▶ Thirty (30) calendar days after the final determination is provided if the requested documents are less than 24 months old
 - ▶ Thirty-five (35) calendar days after the final determination is provided if the requested documents are more than 24 months old

Response Times related to Awards

- ▶ Records must be made available for inspection at an office of the responsible procurement officer within five (5) calendar days

FOIA Fees



- ▶ 30-4-30 (B)
 - May establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records
 - Fee schedule to be posted online
- ▶ Notify the requestor of the estimated costs
- ▶ You may bill in advance before fulfilling the request

What if you don't comply?

- ▶ Civil liability under both FOIA and the South Carolina Trade Secrets Act
 - ▶ \$500 fine under FOIA + attorney fees/costs of litigation
 - ▶ \$100,000 fine under South Carolina Trade Secrets Act
- ▶ Criminal penalties under the South Carolina Trade Secrets Act
 - ▶ Up to 10 years imprisonment



