

NEW OPENNESS POLICY UNDER FOIA

MAY MEAN LESS PROTECTION FOR CONTRACTORS

One of the first actions of the Obama administration was the issuance of the President's January 21, 2009 memorandum implementing policy changes concerning the Freedom of Information Act (FOIA). The President's FOIA memo called on federal agencies to apply a presumption of openness and disclosure in handling FOIA requests and to disclose information rapidly. On March 19, 2009, Attorney General Holder issued a memorandum establishing guidelines to implement the President's instructions. In particular, the Attorney General stated that offices responding to FOIA requests "should not withhold information simply because it may do so legally". The DOJ memo is posted at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. This DOJ memo rescinded an October 21, 2001 memorandum from the previous administration which had announced that the government would more aggressively defend decisions to withhold records requested under FOIA. Now, the DOJ will defend an agency decision to deny a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or (2) disclosure is prohibited by law. While the new bias in favor of greater disclosure will undoubtedly support the release of more information, it remains to be seen exactly how the new openness policy will actually be applied to the release of government contractor sensitive information.

Generally, the government does not release information submitted by government contractors if the release of the information would cause substantial competitive harm to the provider such as certain types of information pertaining to contractor pricing (Exemption 4 of FOIA). For example, a recent case, Canadian Commercial Corp. & Orenda Aerospace v. Air Force, 514 F.3d 37 (D.C. Cir. 2008) reaffirmed that contract line-item pricing is confidential and the disclosure for such information would conceivably harm an incumbent contractor with regard to option years remaining on the contract where the options have not yet been exercised. Also, the government has refrained from releasing information where the disclosure might interfere with internal government deliberations such as contractor past performance evaluations (Exemption 5 of FOIA).

Although, it is not yet clear how the new openness policy will be applied in specific situations, it is wise for a contractor to consider more than ever being proactive in protecting its proprietary information. Agencies may now be more inclined to err on releasing the information rather than withholding it, particularly where there is no strong objection from a contractor. The following steps should be considered. Because agencies are required to notify contractors and afford them a reasonable opportunity to object to disclosure, a contractor that receives notice that its information is being sought under a FOIA request, should be ready to respond immediately. At a minimum the contractor should note its objection and submit a formal response outlining in detail the basis for its objection. Rather than merely relying on a blanket objection, it is usually wise to submit a reasonably proposed redacted version of the documents being sought with a detailed explanation of the basis for why the release of the redacted information would be harmful. This approach can enhance the case for protecting the redacted information while, at the same time, facilitating the government's need to provide the party requesting the information with a meaningful amount of the unredacted remaining information.

As a last resort, the contractor may need to be prepared to turn to the courts and seek an injunction to block the release of information that should be redacted.

SUMMARY

We will continue to monitor the implementation of the new policies relating to FOIA as they pertain to the government contracting process. If you need any additional information concerning these new requirements, or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220 or KBrody@dbd-law.com**.

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