

## §5.11

room containing the agency records described in paragraph (a)(1) of this section. The Department's public reading room is currently located at the National Library of Education, 400 Maryland Avenue SW, Plaza Level (Level B), Washington, DC 20202-0008. To visit the public reading room, members of the public can contact the Department's FOIA Service Center via email at [EDFOIAManager@ed.gov](mailto:EDFOIAManager@ed.gov).

(c) *Hard copies.* For any agency records that are not made available for public inspection in the FEDERAL REGISTER or pursuant to paragraph (a) of this section, the Department will, upon request, provide hard copies in accordance with 5 U.S.C. 552(a)(3).

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(2), 20 U.S.C. 3474)

[75 FR 33510, June 14, 2010, as amended at 84 FR 67867, Dec. 12, 2019]

### §5.11 Business information.

(a) *General.* The Department discloses business information it obtains from a submitter under the Act in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under 5 U.S.C. 552(b)(4) (Exemption 4 of the Act).

(2) *Submitter* means any person or entity (including corporations; State, local, and tribal governments; and foreign governments) from whom the Department obtains business information.

(c) *Designation of business information.*

(1) A submitter must use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be business information protected from disclosure under Exemption 4 of the Act.

(2) A submitter's designations are not binding on the Department and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(3) A blanket designation on each page of a submission that all information contained on the page is protected

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from disclosure under Exemption 4 presumptively will not be considered a good faith effort.

(d) *Notice to submitters.* Except as provided in paragraph (g) of this section, the Department promptly notifies a submitter whenever a FOIA request or administrative appeal is made under the Act seeking disclosure of the information the submitter has designated in good faith as business information protected from disclosure under paragraph (c) of this section, or the Department otherwise has reason to believe that it may be required to disclose information sought to be designated by the submitter as business information protected from disclosure under Exemption 4 of the Act. This notice includes either a description of the business information requested or copies of the requested agency records or portions of agency records containing the requested business information as well as a time period, consistent with §5.21(c), within which the submitter can object to the disclosure pursuant to paragraph (e) of this section.

(e) *Opportunity to object to disclosure.*

(1) If a submitter objects to disclosure, it must submit to the Department a detailed written statement specifying all grounds under Exemption 4 of the Act for denying access to the information, or a portion of the information sought.

(2) A submitter's failure to object to the disclosure by the deadline established by the Department in the notice provided under paragraph (d) of this section constitutes a waiver of the submitter's right to object to disclosure under paragraph (e) of this section.

(3) A submitter's response to a notice from the Department under paragraph (d) of this section may itself be subject to disclosure under the Act.

(f) *Notice of intent to disclose.* The Department considers a submitter's objections and submissions made in support thereof in deciding whether to disclose business information sought to be protected by the submitter. Whenever the Department decides to disclose information over a submitter's objection, the Department gives the submitter written notice, which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained.

(2) A description of the information to be disclosed.

(3) A specified disclosure date that is a reasonable time subsequent to the notice.

(g) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section do not apply if—

(1) The Department does not disclose the business information of the submitter;

(2) The Department has previously lawfully published the information;

(3) The information has been made available to the public by the requester or by third parties;

(4) Disclosure of the information is required by statute (other than the Act) or regulation issued in accordance with the requirements of Executive Order 12600 (52 FR 23781, 3 CFR, 1987 Comp., p. 235); or

(5) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that, in such case, the Department must provide the submitter with written notice of any final administrative disclosure determination in accordance with paragraph (f) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of a submitter's business information, the Department promptly notifies the submitter.

(i) *Corresponding notice to requester.* The Department notifies the requester whenever it notifies a submitter of its opportunity to object to disclosure, of the Department's intent to disclose requested information designated as business information by the submitter, or of the filing of a lawsuit.

(j) *Notice of reverse FOIA lawsuit.* Whenever a submitter files a lawsuit seeking to prevent the disclosure of the submitter's information, the Department promptly notifies the requester, and advises the requester that its request will be held in abeyance until the lawsuit initiated by the submitter is resolved.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

#### § 5.12 Creation of agency records not required.

In response to a FOIA request, the Department produces only those agency records that are not already publicly available and that are in existence at the time it receives a request. The Department does not create new agency records in response to a FOIA request by, for example, extrapolating information from existing agency records, reformatting available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

#### § 5.13 Preservation of agency records.

The Department does not destroy agency records that are the subject of a pending FOIA request, appeal, or lawsuit.

(Authority: 5 U.S.C. 552(a), 20 U.S.C. 3474)

### Subpart C—Procedures for Requesting Access to Agency Records and Disclosure of Agency Records

#### § 5.20 Requirements for making FOIA requests.

(a) *Making a FOIA request.* Any FOIA request for an agency record must be in writing, must include a valid electronic mail or physical address, and must be transmitted to the Department as indicated on the Department's website. See [www.ed.gov/policy/gen/leg/foia/request\\_foia.html](http://www.ed.gov/policy/gen/leg/foia/request_foia.html).

(b) *Description of agency records sought.* A FOIA request must reasonably describe the agency record sought, to enable Department personnel to locate the agency record or records with a reasonable amount of effort. Whenever possible, a FOIA request should describe the type of agency record requested, the subject matter of the agency record, the date, if known, or general time period when it was created, and the person or office that created it. Requesters who have detailed information that would assist in identifying and locating the agency records