



DATE: May 14, 1996

TO: FOI Coordinators

FROM: Acting Freedom of Information Officer, NIH

SUBJ: New Policy for Past Performance Evaluations of NIH Contractors

Heretofore, we have released past performance evaluations of contractors to requesters under the FOIA. Since these evaluations were contained in an agency decision document, Exemption 5 did not apply.

We now have a different policy which becomes effective when you receive this advisory. The DHHS Office of the General Counsel (OGC) has recently advised us that we can withhold past performance evaluations from public disclosure under Exemption 5. The OGC noted that releasing past performance evaluations to competing contractors would harm the Government's interest in a competitive bidding process. However, releasing past performance evaluations to the subject contractor would not impair the Government's interest. We can still use Exemption 5 to withhold the evaluations from all other requesters.

If you receive a request for a past performance evaluation from anyone other than the contractor who was evaluated, please send the request to the NIH FOI office for denial.

A handwritten signature in black ink that reads "Joanne Belk".

Joanne Belk



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May 1, 1996

**MEMORANDUM**

**TO: Mary Armstead  
NIH**

**FROM: Senior Attorney  
Public Health Division**

**SUBJECT: FOIA--Past Performance Evaluations of NIH Contractors**

This supplements our memorandum dated November 9, 1995, which advised that NIH past performance evaluations of its contractors were subject to mandatory disclosure under the Freedom of Information Act. Specifically, the memorandum concluded that (1) Exemption 4 was not available because the evaluations were generated by the Government and (2) while the evaluation could be considered predecisional under Exemption 5, disclosure to the subject contractor would waive any Exemption 5 protection.

In our March 27 telephone conversation with you and Matthew Blum and David Muzzio, OMB Office of Federal Procurement Policy, we were advised that Melanie Pustay, Office of Information and Privacy (OIP), Department of Justice, had articulated a theory for withholding past performance evaluations under Exemption 5 by virtue of Rule 26(c)(7) of the Federal Rules of Civil Procedure. We were further advised that in OIP's view, disclosure of an evaluation to the contractor evaluated would not waive Exemption 5 protection of that evaluation with respect to the public.

Rule 26(c)(7) provides that for good cause shown, a trade secret or other confidential research, development or commercial information is protected from discovery; thus, these types of information are considered within the scope of FOIA Exemption 5. The purpose of this aspect of Exemption 5 is to prevent harm to a Governmental commercial or other interest. Here, public disclosure of past performance evaluations would harm a commercial interest of the Government, i.e., the integrity of the competitive bidding process. Revealing such evaluations could subvert competitive bidding by causing future offerors to structure their bids in ways that are detrimental to the agency. For example, a contractor who knows a competitor has a poor evaluation might submit a higher bid than it normally would, secure in its knowledge that the poorly evaluated competitor will

not be selected. The subversion of competitive bidding will harm the commercial interests of the Government.

Having found that past performance evaluations are within the protection of Exemption 5, OIP further concluded that disclosure of the evaluation to the contractor to which it pertains would not waive the privilege because this limited disclosure would not be inconsistent with the purpose underlying the privilege. In other words, disclosure to the contractor would not subvert the competitive bidding process to the commercial detriment of the Government. Indeed, OIP has determined that disclosure to the subject contractor is probably required to avoid de facto debarment of the contractor in instances of poor performance evaluations.

Our Business and Administrative Law Division, which has Departmentwide responsibility for FOIA, has discussed these issues with OIP and has advised that in light of the position taken by OIP, we can support the withholding of past performance evaluations from public disclosure under Exemption 5.



Howard Walderman  
Senior Attorney