

SUBJECT: Improper Disclosure of Information

NEW MATERIAL: Because of concerns regarding potential leaks of nonpublic information by USAID employees outside of the Agency or the U.S. Government, this Agency-wide notice seeks to provide a reminder to employees regarding the improper disclosure of nonpublic information. Such knowing disclosure may subject Agency employees to civil and criminal liability.

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POLICY

USAID/General Notice
GC/A&A
08/15/2005

Subject: Improper Disclosure of Information

Because of concerns regarding potential leaks of nonpublic information by USAID employees outside of the Agency or the U.S. Government, this Agency-wide notice seeks to provide a reminder to employees regarding the improper disclosure of nonpublic information. Such knowing disclosure may subject Agency employees to civil and criminal liability. As the rules under the Freedom of Information Act and other governing laws and regulations are complex, please contact the Information and Records Division (M/AS/IRD), GC/LE, or your RLA prior to disclosing any potentially nonpublic information outside the U.S. Government.

Rules and Restrictions Governing the Disclosure of Nonpublic Information

Both Federal law and regulations prohibit USAID employees from knowingly disclosing nonpublic information to further their own private interest or that of another. Nonpublic information is defined as information an employee obtains by way of his/her Federal employment and that s/he knows or should reasonably know has not been made available to the general public. Nonpublic information includes information routinely exempt from disclosure under the Freedom of Information Act or other applicable statutes (such as the Procurement Integrity Act, the Ethics in Government Act, or the Trade Secrets Act), Executive Orders, or regulations. See 5 CFR 2635.703 at <http://www.gpoaccess.gov/cfr/index.html> for more information.

Some examples of documents which may not be disclosed by an Agency employee to non-U.S. Government sources without first obtaining proper clearance from the cognizant individuals or offices (depending on the types of nonpublic information at

issue) are as follows: an Agency internal memo from a contracting officer ("CO") regarding a responsibility determination; a legal opinion (in either memo or e-mail form) from GC; documents designated as confidential or protected for reasons of national security; source selection information related to an acquisition or assistance competition or award (discussed separately below); or proposals submitted in response to a competitive solicitation (see FAR 24.202).

Restrictions on Disclosing Source Selection Information Relating to a Contract, Grant, or Cooperative Agreement.

As it relates to contracts, if in the course of your work, you become privy to any source selection information, then the Procurement Integrity Act prohibits you from knowingly transmitting such information (either verbally, in writing, or through the sharing of documents) to anyone other than individuals authorized by the CO to obtain such information. Violation of this legal requirement may subject you to civil and criminal liability.

Source selection information includes any information prepared for use by USAID for the purpose of evaluating a bid or proposal resulting in a contract award, if that information has not been previously made available to the public. Source selection information includes, but is not limited to, the following:

- 1) Offerors' technical and cost/price proposals;
- 2) Identity of offerors;
- 3) Source selection or acquisition plans (including non-published draft scopes of work, cost estimates, and activity and acquisition planning documents);
- 4) Technical or cost evaluation documents, including evaluator scoresheets and technical evaluation memos; or
- 5) Other information marked as "source selection information" based on a case-by-case determination by the CO such that its disclosure would jeopardize the integrity or successful completion of the procurement.

Documents containing protected source selection information should contain on each page the marking "Source Selection Information -See FAR 2.101 and 3.104". If you possess unmarked documents that you believe may contain source selection information, then you should consult with the CO immediately, and in any event, prior to the transmission of such documents to an unauthorized individual, either inside or outside of the Agency.

In the assistance context, the general rule about disclosure of nonpublic information as described in the section above applies. Therefore, for example, USAID employees who become privy to source selection information relating to grant or cooperative agreement awards may not disclose such information pursuant to 5 CFR 2635.703. Failure to comply with this requirement may subject you to civil and criminal penalties.

Despite the general prohibitions on disclosure of source selection information mentioned above, the Agency may not withhold any information pursuant to a proper request from the Congress, another Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Please refer any questions to the Office of General Counsel or your designated RLA with any questions. Program officers are to refer Congressional requests for source selection information to the cognizant contracting or agreement officer. Any release containing source selection information must clearly identify the information as such and notify the recipient that the disclosure of the information is restricted by the Procurement Integrity Act, the Trade Secrets Act, the Privacy Act, or other applicable statute.

Precautions to Take Due to the On-Site Presence of Institutional Support Contractors

The Agency obtains the services of institutional support contractors ("institutional contractors") to perform services that are or may be performed elsewhere in the Agency by direct-hire staff. As USAID continues to rely upon these institutional contractors to perform important duties to assist the Agency in accomplishing its mission, USAID employees must understand the potential risks that stem from the collocation of USAID employees and institutional contractor personnel.

USAID employees (including direct-hire, FSN, personal services contractors) must take certain precautionary steps when interacting with institutional contractors. USAID employees must ensure that they do not disclose to institutional contractors (without a "need to know" basis - see below) sensitive and nonpublic Agency information, including:

- (1) proprietary contractor information (see FAR 9.505-4);
- (2) classified information;
- (3) programming, planning, and budgeting information;
- (4) unsolicited proposal information;
- (5) internal agency communications;
- (6) source selection information; or
- (7) information likely to create an unfair competitive advantage.

Therefore, prior to sharing sensitive and nonpublic information via memo, e-mail, or during a meeting or conversation, USAID employees should take precautions to ensure that recipients of such information are not institutional contractors. An exception to the general rule against sharing nonpublic information is where a USAID employee determines that the information is being shared with an institutional contractor on a "need to know" basis and that the disclosure is in compliance with the various restrictions on disclosing Government information. USAID employees disclosing sensitive information to an institutional contractor should properly document their files, identifying by name the institutional contractor employee along with a description of what information was shared and the reasons for doing so. Additionally, the disclosing

Agency employee should ask the institutional contractor to execute a non-disclosure certificate to include in the Agency employee's files.

Prior to any meeting or conference call during which sensitive and nonpublic information may likely be shared (particularly when such information may give the incumbent contractor an unfair competitive advantage by including its employees in meetings to discuss re-competing the support contract or activity planning), USAID employees should ask institutional contractor employees to identify themselves to avoid any improper disclosure.

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