

record, or portion thereof, has no precedential significance as to the application or non-application of the exemption to any other requested record, or portion thereof, no matter when the request is received.

§1600.7 Special procedures for confidential commercial information.

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

(1) *Business submitter* means any person or entity which provides confidential commercial information, directly or indirectly, to the Foundation and who has a proprietary interest in the information.

(2) *Commercial-use requester* means requesters seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Foundation shall determine, whenever reasonably possible, the use to which a requester will put the documents requested. Where the Foundation has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Foundation shall seek additional clarification before assigning the request to a specific category.

(3) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from disclosure under Exemption 4 of the FOIA, because disclosure could reasonably be expected to cause substantial competitive harm.

(b) *In general.* Confidential commercial information provided to the Foundation by a business submitter shall not be disclosed pursuant to an FOIA request except in accordance with this section.

(c) *Designation of business information.* Business submitters should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Any such designation will expire 10 years after the records

were submitted to the government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(d) *Predisclosure notification.* (1) Except as is provided for in paragraph (i) of this section, the Foundation shall, to the extent permitted by law, provide a submitter with prompt written notice of an FOIA request or administrative appeal encompassing its confidential business information whenever required under paragraph (e) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(2) Whenever the Foundation provides a business submitter with the notice set forth in paragraph (e)(1) of this section, the Foundation shall notify the requester that the request includes information that may arguably be exempt from disclosure under Exemption 4 of the FOIA and that the person or entity who submitted the information to the Foundation has been given the opportunity to comment on the proposed disclosure of information.

(e) *When notice is required.* The Foundation shall provide a business submitter with notice of a request whenever—

(1) The business submitter has in good faith designated the information as business information deemed protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) The Foundation has reason to believe that the request seeks business information the disclosure of which may result in substantial commercial or financial injury to the business submitter.

(f) *Opportunity to object to disclosure.* Through the notice described in paragraph (d) of this section, the Foundation shall, to the extent permitted by law, afford a business submitter at least 10 working days within which it can provide the Foundation with a detailed written statement of any objection to disclosure. Such statement shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential and

§ 1600.8

why disclosure would cause competitive harm. Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* (1) The Foundation shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose confidential commercial business information. Whenever the Foundation decides to disclose such information over the objection of a business submitter, the Foundation shall forward to the business submitter a written notice at least 10 working days before the date of disclosure containing—

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained,

(ii) A description of the confidential commercial information to be disclosed, and

(iii) A specified disclosure date.

(2) Such notice of intent to disclose likewise shall be forwarded to the requester at least 10 working days prior to the specified disclosure date.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of confidential commercial information, the Foundation shall promptly notify the business submitter of such action.

(i) *Exceptions to predisclosure notification.* The requirements of this section shall not apply if—

(1) The Foundation determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such a case, the Foundation will provide the submitter with written notice of any final decision to disclose confidential com-

36 CFR Ch. XVI (7-1-04 Edition)

mercial information within a reasonable number of days prior to a specified disclosure date.

§ 1600.8 Appeals.

(a) *Appeals of adverse determinations.* If you are dissatisfied with the Foundation's response to your request, you may appeal an adverse determination denying your request, in any respect, to the Executive Director of the Foundation, 110 S. Church Avenue, Suite 3350, Tucson, AZ 85701-1650. You must make your appeal in writing, and it must be received by the Executive Director within 60 days of the date of the letter denying your request. Your appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination (including the assigned request number, if known) that you are appealing. For the quickest possible handling, you should mark your appeal letter and the envelope "Freedom of Information Act Appeal."

(b) *Responses to appeals.* The decision on your appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall contain a statement of the reason(s) for the affirmance, including any FOIA exemption(s) applied, and will inform you of the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination, you must first appeal it under this section.

§ 1600.9 Preservation of records.

The Foundation will preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.