

**PART 5  
PRIVACY AND FREEDOM OF INFORMATION**

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**5.1 PROTECTION OF INDIVIDUAL PRIVACY.**

**5.1.1 General.**

***INFORMATION:***

(a) The Privacy Act provides safeguards for individual privacy when BPA contracts for the design, development, or operation of a system of records on individuals on behalf of BPA to accomplish a program function. The Act requires that the contractor follow all of the rules on privacy that applies to BPA.

(b) A BPA employee may be criminally and/or civilly liable for violations of the Act. When the contract provides for operation of a system of records on individuals, contractors and their employees are considered agents of the BPA for purposes of the criminal penalties of the Act.

**5.1.2 Clause Usage Prescriptions.**

***PROCEDURE;*** The CO shall insert Clause 5-1, Privacy Act, in solicitations and contracts and non-Federal IGCs for professional and research and development services, when the proposed contract will involve the design, development, or operation of a system of records on individuals to accomplish a BPA function.

**5.2 FREEDOM OF INFORMATION ACT.**

(a) ***POLICY:*** BPA shall provide the public prompt access to its records, compliant with the letter and spirit of the Freedom of Information Act (FOIA). Employees may furnish to the public, informally and without compliance with the procedures in this section, information and records of types, which they customarily furnish to the public in the regular performance of their duties. Other information shall be made available to the public, unless the FOIA authorizes nondisclosure, and disclosure would not be in the public interest. Disclosure of information subject to the fourth exemption of the FOIA (trade secrets and commercial or financial information privileged or confidential) is normally contrary to the public interest.

(b) ***INFORMATION:*** This subpart describes policies and procedures for responding to requests filed under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These procedures focus on

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situations likely to arise in a purchasing context. For complete FOIA regulations and procedures, see 10 C.F.R. 1004, as amended, and consult with the BPA Freedom of Information (FOI) Act Officer.

(c) **INFORMATION:** COs may receive requests for records that may be exempt from mandatory public disclosure. The exemptions most often applicable are those relating to trade secrets and confidential commercial or financial information (Exemption 4), inter-agency or intra-agency memoranda (Exemption 5), or personal and medical information pertaining to an individual (Exemption 6). Since these requests often involve complex issues requiring an in-depth knowledge of a complex body of court rulings and policy guidelines, COs are cautioned to comply with the implementing regulations and to obtain necessary guidance from the BPA FOI Act Officer.

### 5.2.1 Receipt of a Request.

#### **PROCEDURES:**

(a) A FOIA request should be made in writing and addressed to the FOI Officer. Requests are deemed to be received only upon actual receipt by the FOI Officer. A CO who receives a FOIA request directly from the requester shall:

- (1) Make a copy of the request;
- (2) Immediately contact the FOI Officer and send the original request to be logged in by the FOI Officer (do not write the requester); and
- (3) Begin to research the response if appropriate.

(b) The FOI Officer will:

- (1) Determine who will be the Authorizing (or Denying) Official. The Authorizing (or Denying) Official is the BPA employee who either has custody or is responsible for records requested under the FOIA. For requests involving solicitations, contracts and related documents, this shall be the cognizant CO.
- (2) Write to the requester and acknowledge receipt of the request. This acknowledgment letter, signed by the FOI Officer, informs the requester of the official date of receipt, the due date for our response (20 working days from the date of receipt), and the name of the primary Authorizing Official.
- (3) Send a copy of the request, a copy of the acknowledgment letter, and detailed instructions to the Authorizing Official who will complete a response within 20 working days after the date of receipt of the request.

(c) The Authorizing Official shall then determine whether or not BPA has the requested information and, if so,

- (1) Identify and review the requested documents.
- (2) Determine whether the information can be released.
- (3) Notify the originator of the requested data to solicit comments regarding its release. If the originator objects to the release of data, the Authorizing Official, in consultation with

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General Counsel, must determine whether or not to accept the recommendation of the originator to deny release, in whole or in part, as per 5.2.3 and 5.2.4.

- (4) If the data can be released (request granted in whole), the Authorizing Official shall within 20 working days (see 5.2.7):
  - (A) Prepare a letter to grant the request in accordance with 5.2.2;
  - (B) Consult with General Counsel and/or the FOI Officer, as necessary;
  - (C) Sign and mail the cleared response to the requestor, and send a copy to the FOI Officer.
- (5) If the data can not be granted in whole (granted or denied in part or denied in whole), the Authorizing Official shall within 20 working days (see 5.2.7):
  - (A) Prepare a draft letter to the requester for the FOI Officer's signature, either granting or denying the request in part or denying in whole (see 5.2.3 and 5.2.4);
  - (B) Consult with General Counsel and/or the FOI Officer on draft response;
  - (C) Send the response letter to the FOI Officer for his signature.

#### **5.2.2 Granting the Request.**

**PROCEDURE:** If the requested information is available and is not exempt from public disclosure, the written response shall grant the request and either attach the documents or state when and how the documents will be made available. Fees may be charged if the cost to BPA in supplying the information exceeds \$15.00. These fees may be waived if the FOI Officer determines that it is in the public interest to do so. The Authorizing Official shall consult with the FOI Officer if fees are anticipated. If fees are applicable, the information cannot be released until all charges are paid in full. The FOI Officer will assess any such fees. Financial Services will collect any such fees.

#### **5.2.3 Denying the Request.**

**PROCEDURE:** If the material is exempt from mandatory public disclosure, and it is in the public interest to withhold it, the written response shall deny the request. The response must include the reason for denial, the specific exemption under the FOIA, an explanation of how the exemption applies to the particular record withheld, a statement addressing the issue of whether there is any segregable nonexempt material in the document, and a statement explaining why a discretionary release is contrary to the public interest.

- (a) Exemptions. Of the nine exemptions authorizing the withholding of a record, two are most likely to apply to information received during the BPA purchasing process:

- (1) FOIA Exemption 4: Trade secrets and commercial or financial information obtained from a person and privileged or confidential (5 U.S.C. 552(b)(4)). In the purchasing process such information usually comes into BPA's possession in response to a request for proposal or similar document. A private business submitting confidential or privileged information to BPA may claim an exemption from mandatory public disclosure for all or part of it. If BPA receives an FOI request for such information, the submitter must be notified and allowed to participate in the decision-making process. However, the Authorizing Official shall be responsible for making an independent, final determination of

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whether or not to disclose. If the decision is to release the information, the submitter must be notified not less than seven days before the intended public disclosure. The Authorizing Official will consider the following criteria in determining whether information can be withheld under Exemption 4:

(A) Whether the information has been held in confidence by the person to whom it pertains;

(B) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(C) Whether the information was transmitted to and received by BPA in confidence;

(D) Whether the information is available in public sources;

(E) Whether disclosure of the information is likely to impair BPA's ability to obtain necessary information in the future; or

(F) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(2) FOIA Exemption 5: Inter-agency or intra-agency memoranda or letters which would not be available by law to a party; other than an agency in litigation with the agency (5 U.S.C. 552(b)(5)). Exemption 5 includes the deliberative process privilege, which protects recommendations or opinions generated before the decision-making process is concluded, and the attorney-client privilege and attorney work product.

(b) How the exemption applies. The response must include a reasonable specific justification relating the exemption to the particular information being requested. Specific facts supporting the conclusions reached are required, not generalized restatements of BPA regulations and procedures.

(c) Segregation of exempt material. If only portions of a document are exempt from mandatory disclosure, the exempt portions must be deleted, if practicable and the remainder of the document released.

(d) The response denying a request must also include the name and title of the Denying Official and the following statement explaining procedures for appealing the denial:

You may appeal this denial of your request pursuant to 5 U.S.C. 552(1)(6)(A)(1) and 10 C.F.R. 1004.8. Such appeal must be in writing and made within 30 days of receipt of this letter to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington D.C. 20585, and both the appeal letter and envelope shall be clearly marked "Freedom of Information Appeal." If you appeal and are still denied the material you request, you may appeal within the Federal Court District in which you reside, or have your principal place of business or in which the Bonneville Power Administration's records are located, or in the District of Columbia.

(e) After drafting the denial response in consultation with General Counsel according to the guidelines above, send the original to the FOI Officer for signature. The FOI Officer shall sign the response and send it by certified or registered mail, return receipt requested. A signed copy of the response is kept in the FOI Officer's official files.

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#### **5.2.4 Grant the Request in Part and Deny It in Part.**

**PROCEDURE:** Segregate the exempt from the nonexempt documents or portions thereof and follow the procedures above.

#### **5.2.5 Records Cannot Be Located or Do Not Exist.**

**PROCEDURE:**

(a) There is no obligation to compile or create a record solely for the purpose of satisfying a request. If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester shall be appropriately notified according to the denial procedures above. Concurrence of General Counsel is not required in these instances; however, when a request is denied because the record does not exist, consultation should be held with either the FOI Officer and General Counsel to assure that the records do not exist elsewhere within BPA.

(b) There is, similarly, no obligation to honor a request for records not yet in existence, even where such documents may be expected to come into existence at a later time. The requester may be notified when the document may be available as part of the denial response.

#### **5.2.6 Additional Information is Required to Clarify Request.**

**PROCEDURE:** The Authorizing Official will contact the requestor if additional information is needed to clarify the request. If the request is too vague or all-encompassing to allow a response, the Authorizing Official will work with the FOI Officer, as necessary, to clarify the request. If that is insufficient, a written response must be prepared, specifying the reasons for the inadequacy of the request and extend to the requester an opportunity to confer with the Authorizing Official or other knowledgeable BPA personnel to reformulate the request. This response must be cleared by General Counsel and signed by the FOI Officer.

#### **5.2.7 Time Limits and Extensions.**

**PROCEDURES:**

(a) Ordinarily, the Authorizing Official has 20 working days after receipt to respond to a FOI request. If an initial determination cannot be made within that time, notify the FOI Officer. The Authorizing Official will negotiate an extension with the requester. Any such extension shall be confirmed in writing, specify the total time agreed upon, and be signed by the FOI Officer.

(b) If an agreement with the requester cannot be reached, the Authorizing Official may take an extension not to exceed 10 working days. This extension requires:

- (1) Unusual circumstances, (i.e. records located at field facilities, a voluminous amount of separate and distinct records, or the need to consult with another agency;)
- (2) A written notification of the extension to the requester giving the reason and the date for the determination;
- (3) Clearance of the letter by General Counsel, a copy to the FOI Officer.

#### **5.50 TEXT OF CLAUSES.**

The following clause is referred to in BPI Part 5:

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### 5-1 Privacy Act

#### **Clause 5-1 PRIVACY ACT (Oct 93)(BPI 5.1.2)**

(a) The Contractor shall be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of 1974, Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable DOE regulations.

(b) The Contractor agrees to:

(1) Comply with the Privacy Act of 1974 (the Act) and the agency rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals.

(2) Include this clause in all subcontracts awarded under this contract which require the design, development, or operation of such a system of records.

(c) In the event of violations of the Act, a civil action may be brought against BPA if the violation concerns the design, development, or operation of a system of records on individuals to accomplish a BPA function, and criminal penalties may be imposed upon the employees of BPA when the violation concerns the operation of a system of records on individuals to accomplish a BPA function. For purposes of the Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor and any employee of the Contractor are considered to be employees of BPA.

(End of clause)