

after grants have been awarded for a given application period.

EFFECTIVE DATE: This policy became effective on July 9, 2003.

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SUPPLEMENTARY INFORMATION: The Legal Services Corporation (LSC) is not a "department, agency, or instrumentality of the Federal Government." 42 U.S.C. 2996(d). LSC is, however, by the terms of its organic legislation, subject to the Freedom of Information Act (FOIA). *Id.* LSC has issued regulations¹ governing its basic FOIA procedures. See 45 CFR part 1602.

Under FOIA and LSC regulations, a requested record may be withheld from disclosure if, inter alia, the record contains trade secrets or commercial or financial information obtained from a person and is privileged or confidential. See 5 U.S.C. 552(b)(4); 45 CFR 1602.9(a)(3). In the past, LSC policy has been to routinely withhold grant application materials submitted in connection with the competitive bidding process pursuant to this exemption. For the reasons set forth below, LSC has decided that documents submitted by applicants as part of grant applications (the Proposal Narrative (parts 1 & 2) on original grant applications and the Application Narrative (parts A & B) for grant renewal applications) are generally not entitled to protection from disclosure in response to FOIA requests after grants have been awarded for a given application period. LSC will continue to review each request for this information on a case by case basis to ascertain whether there is anything extraordinary in a given narrative which merits withholding and will continue to provide persons and organizations whose applications have been requested opportunity to seek protection from disclosure of some or all of the documents requested upon an individualized showing of competitive

harm. However, LSC's general policy will be to release this information.

It should be noted that, since this policy change is not a "rule, regulation, guideline or instruction," LSC is not required by law to publish this policy notice or seek public comment. LSC is choosing to publish this interpretive policy statement in the **Federal Register** (and has also posted it on the LSC website at <http://www.lsc.gov>) in furtherance of LSC's interest in and policy of conducting its business in a fair and open manner.² LSC invites interested parties to submit written comments on this matter.

Exemption 4 of FOIA is codified at 5 U.S.C. 552(b)(4) and provides that the requirement for disclosure of most public documents "does not apply to matters that are * * * trade secrets and commercial or financial information obtained from a person and privileged or confidential." According to FOIA case law, documents submitted to LSC for competitive bidding qualify as "commercial or financial information obtained from a person."³ With that threshold met, the relevant analysis upon receipt of a request for competitive

² LSC originally published a notice regarding this change in policy on April 17, 2001 (66 FR 19798) and invited the public to comment prior to effectuation of the change. LSC received one comment opposing the change. The commenter expressed concern that disclosure of the proposal narrative after the close of competition will cause competitive harm by allowing persons to, essentially, copy a successful grant application for later LSC competitions or other grants. For the reasons discussed above, however, LSC believes that the type of information found in the grant narratives does not rise to the level of detail or specificity required by the Exemption 4 case law, such that it is not legally defensible under the FOIA case law for LSC to maintain a presumption against disclosure of proposal narratives. To guard against harm in specific cases, however, as discussed above, LSC will continue to make Exemption 4 determinations related to proposal narratives on a case-by-case basis, allowing submitters the opportunity to explain why their respective proposal narratives should not be released in response to a FOIA request. In fact, the submitter's rights process has recently been formally codified into the Corporation's FOIA regulations. See 68 FR 7433 (Feb. 14, 2003).

³ The Court of Appeals for D.C. has held that "commercial" and "financial" should be given their "ordinary meanings." *Public Citizen Health Research Group v. FDA*, 704, F.2d 1280, 1290 (DC Cir. 1983) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Examples of documents which have been accepted as "commercial or financial information" include business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial conditions. See *Landfair v. United States Dep't of the Army*, 645 F. Supp. 325, 327 (D.D.C. 1986). The term "person" has been interpreted to include a wide range of entities, including private organizations such as grantees. See e.g., *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (term "person" includes "an individual, partnership, corporation, association, or public or private organization other than an agency.")

grant application documents is whether the information sought is "privileged or confidential."

In evaluating Exemption 4 cases, the D.C. Circuit Court has established two tests for determining whether documents are "privileged or confidential," identifying one test as applicable to documents which are submitted to the relevant agency pursuant to a requirement, and another test for documents which are voluntarily submitted to the relevant agency.⁴ Although "required information" and "voluntary information" were never explicitly defined in the cases which articulated these tests, the Department of Justice (DOJ) has concluded that a submitter's voluntary participation in an activity—such as seeking a government contract or applying for a grant or loan—does not govern whether any submission made in connection with that activity is "voluntary." DOJ has recommended that in examining the nature of a submitter's participation in an activity, agencies should focus on whether submission of the relevant information was required of those who chose to participate.

Pursuant to the DOJ guidelines and other federal case law, including federal case law from the District of Columbia,⁵ it is clear that the information submitted to LSC by applicants for competitive LSC grants would be considered "required" information, because recipients' receipt of grants is contingent upon the provision of the relevant information to LSC. Consequently, a determination of whether this information is "privileged or confidential" would involve the analysis for "required information" which was first articulated in the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and reiterated in the case of *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). According to this test, "commercial or financial

⁴ See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (articulating test which is now applied to documents submitted pursuant to a requirement), and *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (creating new test to be applied to documents submitted voluntarily).

⁵ See, e.g., *Martin Marietta Corp. v. Dalton*, 974, F. Supp. 37, 39 (D.D.C. 1997); *McDonnell Douglas Corp. v. NASA*, 981 F. Supp. 12, 15 (D.D.C. 1997); *McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 319, 325-26 (D.D.C. 1995); *Chemical Waste Management Inc. v. Leary*, 1995 WL 115894 (D.D.C. Feb. 28, 1995); *TRIFID Corp. v. National Imagery & Mapping Agency*, 10 F. Supp. 2d 1087, 1098-1101 (E.D. Mo. 1998); and *Source One Management v. U.S. Dept. of Interior*, No. 92-Z-2101, transcript at 6 (D. Colo. Nov. 10, 1993) (all holding that information submitted in application for government contract was "required" information).

¹ LSC is authorized by Congress to issue regulations as necessary to carry out its mission. See 42 U.S.C. 2996(e). Since LSC is not a Federal agency, however, LSC is not subject to the requirements of the Administrative Procedures Act, which governs the rulemaking activities of Federal agencies. Rather, LSC is required to "afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and it shall publish in the **Federal Register** at least 30 days prior to their effective date all its rules, regulations, guidelines and instructions." 42 U.S.C. 2999(g).