Freedom of Information Act (FOIA) & Procurement

October 27, 2023





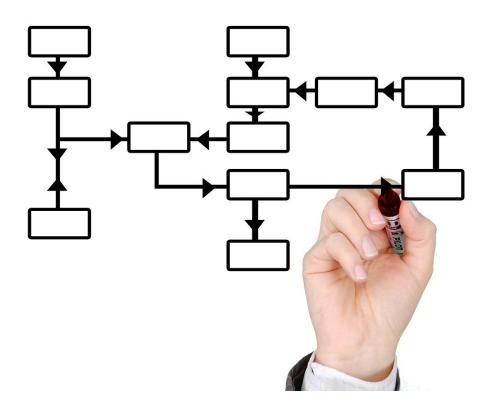
You want to know what?

Public Records Laws

- Chapter 4, Title 30
 The Freedom of
 Information Act (FOIA)
- Procurement Code -Section 11-35-410



I've gotten a request, What do I do?



- Review the Request
- Acknowledge the Request
- Notify the Offeror, if necessary
- Bill for Costs in Advance or Notice for Costs, if necessary
- Respond to the Request



Review the Request

- Nature of the written request
- Requestor
- Are documents publicly available?
- Age of the documents
- Are these documents that should be withheld?

Procurement Withholding List

- Unopened Bids & Proposals
- Information Supplied for Determination of Responsibility
- Confidential Information submitted in Offer or during negotiations
- Documents or Information exempt from disclosure by Statute



Withheld prior to Award or Intent to Award

- Pre-opening Identity of Bidders, Number of Bids, and Characteristics of Bid Samples
- Pre-opening Identity & Number of RFQ Submittals
- Pre-Intent to Award Identity of Offerors and Number of Proposals
- Pre-Intent to Award Source Selection Information

What is not public information? - FOIA

- Definition of Public Record under FOIA 30-4-20 (c)
- Exempt from Disclosure (30-4-40)
 - Trade Secrets
 - Information of a personal nature
 - Documents of proposed contractual arrangements (become available once a contract is entered)

What is not public information? Procurement Code

- Section 11-35-410 (B)
 - Privileged and confidential information - where the release may cause harm to the competitive position of the vendor
- Regulation 19-445.2010
 - Information is confidential prior to issuance of award or intent to award
 - Non-disclosure agreements must be signed prior to releasing RFP responses
 - Non-public solicitations

Redaction

- Request vendors to redact their offers
- The entire proposal may not be redacted
- 11-35-410 (D) "Information not marked as required by the applicable instructions may be disclosed to the public"
- State must redact any Statecreated documents
- When redacting make sure the information is not visible



What if I don't have the documents?

Section 30-4-30 (A)(2)

"A public body is not required to create an electronic version of a public record when one does not exist to fulfill a records request"

Refer the requestor to the appropriate agency, if you know the records are held by a different agency.

Do not forward a FOIA request to another agency

Acknowledging the Request

- Should include:
 - Explanation of any documents will be withheld and why
 - Notice of any FOIA costs
 - Explanation of any delay in making documents available
 - Provide a date when the documents will be provided



FOIA Response Times

- Acknowledgement
 - Ten (10) business days if the requested documents are less than 24 months old.
 - Twenty (20) business days if the documents are over 24 months old
- Furnishing the records or making them available for inspection or copying
 - Thirty (30) calendar days after the final determination is provided if the requested documents are less than 24 months old
 - Thirty-five (35) calendar days after the final determination is provided if the requested documents are more than 24 months old

Response Times related to Awards

Records must be made available for inspection at an office of the responsible procurement officer within five (5) calendar days

FOIA Fees

- ▶ 30-4-30 (B)
- May establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records
- Fee schedule to be posted online
- Notify the requestor of the estimated costs
- You may bill in advance before fulfilling the request

What if you don't comply?

- Civil liability under both FOIA and the South Carolina Trade Secrets Act
 - \$500 fine under FOIA + attorney fees/costs of litigation
 - \$100,000 fine under South Carolina Trade Secrets Act
- Criminal penalties under the South Carolina Trade Secrets Act
 - ► Up to 10 years imprisonment



