

## FOIA Webinar October 27, 2023 Transcript

**01:44.153** Okay, I think we've just got to have everybody in the room. Good morning, everyone. Thank you for joining today.

**01:48.859** We are having our monthly webinar series and we are going to speak today on the Freedom of Information Act or FOIA and procurement.

**01:59.300** I'm Kimber Craig. I'm the Deputy Chief Procurement Officer for the state of South Carolina.

**02:04.065** So I will be conducting the webinar today. We are focusing today on document requests and responding to Freedom of Information Act request for documents.

**02:15.021** We will not be covering public meetings and RFP meetings and how those are conducted under FOIA.

**02:21.150** We are strictly focusing on the documents. So we're going to get started.

**02:25.023** Let me share my screen.

**02:30.046** So does everyone see the Freedom of Information Act screen?

**02:37.630** So if so, I'm going to get started.

**02:41.630** So like I said, we're gonna talk about the document process and what to provide, when to provide it, what you withhold, what do you submit?

**02:53.220** I will go through this. If anybody has any questions, feel free to put those in the chat.

**02:58.090** We do have some questions that were submitted ahead of time. I do believe we've answered most of those in the presentation. But if not, we will catch those at the end.

**03:09.283** So when we talk about Freedom of Information Act or document request.

**03:13.674 --> 00:03:22.555**

One of the best, easiest ways, to say it is, you know, "you wanna know what?" And I will tell you a funny story.

**03:22.556** I spent my the first part of my procurement career, I spent about 15 years in the private sector. Which is a very different world from public sector procurement.

**03:32.253** And I remember when I came to the state, I was in the the Central Procurement Office. I had done my first invitation for bid had awarded it. I was very excited and thought I had

done a great job.

**03:42.604** And I received an email from one of the unsuccessful bidders asking for the bid tab and wanted to know who all submitted bids and what the prices were.

**03:52.756** And I basically kind of had the reaction of this cat of "Are you out of your mind crazy that you want to know this information?" because we never would have revealed that in the private sector at my previous position.

**04:05.201** I went into a coworker's office. And I was somewhat indignant.

**04:10.108** "Can you believe that they're asking this? And they want me to tell them they know what to be the next time. And that's just it's crazy!" And they looked at me and said, "Well that's the law. You have to tell them." So it was very much a wake up call for me.

**04:23.912** And, so I learned very quickly that yes, that is public information. And that is something that we need to do.

**04:31.736** And so I was very hesitant when I first got the request. Over time I have learned that, you know, as a we spending taxpayer dollars it is our obligation to be good stewards of taxpayer money.

**04:46.843** And that the public has a right to know how we are spending their money to ensure that we are doing things in a correct manner, that we are following the rules that we have established, and that there is not anything underhanded occurring.

**05:03.520** So, transparency is a good thing, but we need to make sure there are rules that we follow when we get out this information and how we do that.

**05:14.575** So we're gonna go see today kind of what those rules are and what the best process is to follow.

**05:20.701** So when we talk about our public records laws, I'm gonna focus today on two main areas. One is the Freedom of Information Act or what everybody knows as FOIA, and that's Chapter 4, Title 30. And the Procurement Code has a section on public disclosure of procurement information and that is in section 11-35-410. So those are the two primary area that I'm going to talk about.

**05:46.109** So when we go through the laws, you know, sometimes it's very hard to dovetail "well this section says this" and "this section says that."

**05:58.015** And how do I make sure that I'm following both and that I'm still in compliance? And you gotta look two different places.

**06:03.883** Well, the good thing is in our Procurement Code Books that we sell in our office, we actually include the Freedom of Information Act.

**06:13.941** So if you look in those Code Books, is the back behind the Procurement Code itself and before the Regulations, we actually have the entire FOIA statute in there. So we do have one book in one place.

**06:30.840** I know there's a lot of information and some people may not even realize it's back there, but it starts on page 123. So if you can get through the first 122 pages, then you can read the Freedom of Information Act and learn anything you need to know for that.

**06:47.321** Another suggestion I have in dealing with FOIA is most agencies have a FOIA person, contact person, whether that is someone in their Public Relations area, Legislative Relations, or whether it's someone in their General Counsel's office that kind of handles the majority of FOIA requests for the agency.

**07:09.713** That person should really be familiar with FOIA. They also should be familiar with the Procurement Code requirements. Though I've heard some anecdotal evidence that maybe they're not as familiar with the Procurement Code section as they are with the FOIA guidelines.

**07:23.103** But they should be able to assist you and help you if you have any questions related to FOIA and how you should respond if you have any issues with responding.

**07:35.661** So what I'm gonna do today is I'm gonna kinda go through our process and let you know what we do and how we handle it.

**07:44.350** So when we get a request...it is... so what's the first step?

**07:49.264** Well, The first thing you wanna do is look at it. You need to know what they're asking, who's asking. That'll kind of give you a good idea.

**07:58.186** Then once we've reviewed that, we acknowledge it, and we'll talk a little bit about what that involves.

**08:03.093** You may have to notify the offeror if it's related to a solicitation. So we'll talk about when you do that, and what you need to tell them, and when that is required.

**08:14.275** You may bill for costs, either in advance or just say, "hey I'm gonna charge you." And you can send that to the requester.

**08:22.687** And then the final thing is you respond to the request and you provide the documents that you have and you're availability. And we'll go through each of these steps because even though... there's... it looks super easy, it's really not quite as easy as it appears.

**08:39.492** So there's a lot of different factors.

**08:41.758** So when we talk about reviewing the request, first thing we wanna do is look at the nature of the written request.

**08:48.123** And this is one that I know I struggled with initially is: we have to respond to the request as written and not what you think the request are meant to ask for.

**08:59.922** So, you know, they may have asked for a bid tab. Well, this is really a request for proposal, so really what they want are the evaluation sheets. They didn't ask for the evaluation sheet, so I don't give them the evaluation sheets. I give them what they ask for. So I give them the bid tab.

**09:19.059** Sometimes they may ask for everything and the kitchen sink. I know we've gotten some of those requests before.

**09:28.712** So if you think that what they've asked for is more than maybe they meant to ask for, or they don't understand how much they're gonna get in response to that request, you can call and talk to the requester and ask them, "hey. Do you really wanna narrow this down? Do you wanna tailor it?"

**09:46.349** Maybe. You know, they might even withdraw it, you never know, but that is an option.

**09:51.384** But you really want to look for what they're asking for and only respond to what they're asking for.

**09:58.245** Then you need to look at the requester. Is this a actual bidder or an offer?

**10:05.652** They may have some different response times than somebody who is just an interested member of the public.

**10:10.938** Is it a request for the media? So at SFAA, if we were if we receive a media request, that's handled differently through a different office than our office.

**10:26.144** So if we get a media request for a contract or a solicitation, rather than us filling it like we would for a bidder, we forward that to our person who handles all media requests.

**10:37.264** Are the documents publicly available? So a lot of times we'll get a request for a copy of the solicitation.

**10:42.756** Well that's publicly available on our website. So even though it's public, it's publicly available, under FOIA, we still have to provide it on request, but maybe we send them the link to that specific document rather than you know, downloading the solicitation and sending them a copy.

**11:00.467** When we do send a link, we do need to make sure we send the link directly to the document, not "go to our website and click these 5 links to get to the solicitation document." We want to send them the direct link.

**11:12.927** We look at the age of the documents. Are they, asking for something that's related to a solicitation that was awarded last week, or are they looking for a contract that's been in place for four years? Those are different response times. So we'll need to look at that and see how we need to respond.

**11:29.136** Are these documents that should be withheld?

**11:31.965** So there are some times that under the law that says you don't release these things. So we need to look and say are they asking for something that I should not give?

**11:41.324** And so I need to know how to respond based on that. So we kind of go through, look at those lists, and see what we need to do.

**11:49.843** One of the biggest issues is that last bullet are these documents that should be withheld?

**11:56.080** And there are a lot of questions that are "Do I release this? Do I not release this? I'm not a hundred percent sure. I wanna make sure I do the right thing."

**12:04.502** So we have a really quick list of what we call the procurement withholding list. And so these are things that we know we do not release.

**12:14.905** So if it is an unopened bid or proposal, so that is, of course, any bid that is submitted, or proposal submitted prior to an opening date would be considered unopened.

**12:25.658** If we have issued a solicitation and then cancelled that solicitation, but we've already received bids and we cancelled it before the opening date, those bids are considered unopened and wouldn't be with...would be withheld and not released.

**12:40.994** So that's a case where say I have a bid that opens tomorrow morn...well not tomorrow, it's Saturday, but Monday morning and I cancel it this afternoon at 3 o'clock.

**12:51.810** Well, maybe I had a bidder that was, you know, Johnny on the spot and they submitted their offer yesterday afternoon or this morning.

**12:58.977** So I have an offer in hand. But I've cancelled that solicitation and not opened it.

**13:03.590** If somebody requested a copy of that offer, I would not release it. It would not be publicly available.

**13:09.682** If a vendor submits information related to their responsibility and the determination and responsibility, that typically is withheld.

**13:17.574** Confidential information that submitted in an offer and during negotiations. We'll talk about that a little bit more in a minute.

**13:25.532** And of course anything that any documents are information that is exempt from disclosure by statute. Those things would also be withheld.

**13:35.597** We also have a list of things that are withheld prior to award, but then maybe after the award they become publicly available.

**13:46.156** So if I'm doing an invitation for bid, before that is open, I cannot reveal any identity of bidders.

**13:53.691** I can't reveal the number of bids that have been received.

**13:56.888** If I have, in requesting bid samples, I can't identify the characteristics of any of those bid samples to anyone.

**14:04.709** So, you know, I've got a bid that opens next Friday, and a vendor calls and says, "hey, has so and so bid?" I can't tell you that.

**14:14.023** "How many offers have you received? I need them am I gonna be competing against two people or five people." Of course we wouldn't release that information.

**14:22.856** Same thing goes for RFQ submittals. Before that we actually open those we do not reveal either the identity or number of submittals that we've received.

**14:32.241** For RFPs is a little bit different. We withhold that information until the intent to award is issued.

**14:40.286** So on RFP, nothing is publicly available until the award's made. On a bid, from the time I open it to the time it's awarded, I can actually release the number of bids, the identity of the bidders and the bid tab.

**14:55.673** So that can be available almost immediately.

**14:59.344** And then pre intent to award, any source selection information related to any of the solicitations, regardless of whether it's a an invitation for bid or an RFP or any other source selection method.

**15:13.439** Those would not be available to be released.

**15:20.645** So within the FOIA statue itself, there is also some other information about things that are exempt from disclosure.

**15:26.976** So that section is section 30-4-20 item C is the definition of public record.

**15:33.946** So it's a pretty lengthy definition of what is a public record and there are some items in there that are not a public record.

**15:41.617** A lot of things that are in there that are not public records are not procurement related, so I'm not going to go through that definition, but that's where that definition is, if you would like to get read it and understand it.

**15:53.936** They also list some things specifically that are exempt from disclosure in section 30-4-40. These include trade secrets.

**16:03.042** We'll talk about trade secrets a little bit.

**16:05.040** Information of a personal nature. That's related to an individual. And then documents of proposed contractual arrangements.

**16:13.130** Now those, the last bullet, they do become publicly available once the contract is entered. So that really dovetails with our disclosure list of once the award is made,

**16:25.366** most things are going to be publicly available at that point, even though they are withheld prior to that date.

**16:35.155** So in the Procurement Code section on disclosure, there's also some information where we talk about what is and is not available.

**16:45.987** So, 11-35-410(B) talks about privilege and confidential information. So this is slightly different than trade secret.

**16:54.105** This is information where the release may cause harm to the competitive position of the vendor. So what we don't want to do is,

**17:01.560** we don't want vendors to submit us information that we need to evaluate their suitability, but then release that publicly so that they are now damaged in relation to their competitors.

**17:15.529** So some things at that, and these are listed in the Code. are customer lists: a lot of a lot of vendors don't want people to know who all their customers are.

**17:25.331** Design recommendations or any identifications of problem areas under the RFP.

**17:30.894** Design concepts including methods and procedures. And then biographical data on key employees of the bidder.

**17:38.358** So you certainly don't want to release the resume of all the the key employees, and then their competitors will go poach them.

**17:45.742** And then we've awarded and said, "hey, we want this person on our contract." The competitor poached them, and then now we have to find a replacement key employee

**17:53.417** So that information typically is not going to be released.

**17:57.904** We also have a corresponding Regulation, which is 19-445.2010.

**18:05.356** So we talk about information being confidential prior to the issuance of award or intent to award. Again, that details with the FOIA requirements.

**18:13.259** So because we are required to keep that information confidential, that is why we have our evaluation panel sign non-disclosure agreements prior to releasing the RFP responses.

**18:25.013** So the regulation requires us to do that. And that is anybody who's going to be reviewing those responses, whether they are a evaluation panel member.

**18:36.712** They may be a negotiation team member. They may be somebody else...a subject matter expert.

**18:46.185** Anybody who's gonna have access to those RFP documents prior to the award being made.

**18:53.687** We do ask them to sign a nondisclosure.

**18:56.284** We've had cases where we've gone through the evaluation, we've gone through the negotiations. The agency wants to inform their executive leadership on what they're doing. They want to see the RFP.

**19:08.976** We do ask them also to sign non disclosure agreements.

**19:12.498** So if you ever are doing an RFP and ask somebody to sign a non disclosure and they push back and don't want to sign it, you can point them to this Regulation that says we have to have a non-disclosure agreement before you can get the RFP response.

**19:27.956** The other item in this Regulation talks about non public solicitation.

**19:33.419** So this is actually a solicitation, this is a state created document that we would not want to release publicly.

**19:41.334** And so the question is, well, how do I solicit for something, but then don't release it publicly?

**19:46.167** Well, there may be cases where maybe we're doing some...a solicitation for the Division of Technology Operations or Division of Information Security, and they're soliciting for some services to help protect the states networks.

**20:03.143** Well, we don't want to publish the state's network architecture publicly. That kind of defeats the purpose of having somebody contracted to help protect it.

**20:12.415** So what we do is we will issue a solicitation that says, "we're looking for these services. Here's some public information that's available."



**20:22.265** We will release some information on the architecture to potential offers, but you are going to have to sign a non-disclosure.

**20:30.180** And here's the non-disclosure agreement that you have to sign." So the vendor will sign a non-disclosure agreement that says,

**20:36.781** "I'm not gonna release this information publicly. I'm only gonna use it for a bid. I'm gonna destroy it when I no longer need it."

**20:42.929** We do have sample forms that we use for those non-disclosure agreements. And we will put those notices in the solicitation.

**20:50.834** The vendor signs it, returns to us, and then we submit the confidential information directly to that vendor.

**20:59.442** We do not post it on our website. It's not available for anybody to see.

**21:05.479** So we do have a process or procedure for that. If there's anything that is, you know, Department of Corrections may have some, things that they need to do that we don't wanna release publicly.

**21:18.298** And you know that will compromise security of SCDC employees or the inmates. We wanna keep those things private. So there are cases where you can do that.

**21:33.937** So if we've got information that we need to hold back, what do we have to do? And this is when we get into redaction.

**21:41.101** And a lot of the...most of the redactions that we see, of course, are related to vendors in their offers providing privileged, confidential, trade secret information.

**21:53.093** So the biggest thing to do is to ask the vendors to provide the redacted copies or to mark them confidential.

**22:00.210** We prefer them to do their own redactions and provide us a separate copy that already has the redactions done.

**22:06.575** Our standard clauses do allow them just to mark it confidential. But then when we receive those it's our responsibility for the State to go through that document and make sure everything is redacted and blacked out that is marked private or confidential.

**22:21.311** If the vendor does it, then that responsibility is on their shoulders.

**22:26.652** Of course, we often get responses from vendors where the entire proposal is redacted.

**22:31.960** And their entire, you know, "everything in this proposal is confidential."

**22:35.220** That's not allowed because I can't imagine everything in the proposal would be a trade secret or a privileged or confidential.

**22:44.420** So in those cases we do go back to the vendors and ask them to update their redactions and say that they did the proposal is overly redacted.

**22:56.073** There is in the Procurement Code statute, 11-35-410(D) that says if a vendor does not mark the information as confidential or privileged, it does not and does not mark it as trade secret,

**23:10.040** That information may be disclosed to the public. So they are under notice. That's included in our clauses that says, "hey, you need to mark it.

**23:19.372** if you don't, you know, we don't have the knowledge or the capability to know what exact information that the vendor provides is confidential or privileged or trade secret."

**23:31.314** Now we know we have some lists that they give us; resumes of key employees that's not marked confidential, we may go back and say,

**23:40.015** "hey, did you mean to not mark this?"

**23:42.780** Customer lists, things of that nature. But again, it's really incumbent on the vendors to mark those as privileged or confidential.

**23:54.131** Of course, the State has to do the redactions on any State created document.

**23:58.385** And the key is to make sure that that information is not visible.

**24:03.026** I know of cases where people have gotten the black magic marker and then they make a copy and you can still see the information behind the black magic marker.

**24:12.357** Or they've gone through in Adobe or Word and blacked it out. But then when you send it to somebody, if they are pretty savvy with either of those 2 programs, they can remove the redactions.

**24:26.939** So you just wanna be very careful if you're doing that redacting that that information is not visible or can be made visible.

**24:35.253** The other thing we do in our office is, if the vendors have not provided a redacted copy, we have 2 ways to do it.

**24:46.001** One is you tell us. What's redacted? What's more confidential? You provide us a redacted copy.

**24:52.045** Or we have a space on the cover page that says I don't need to redact anything. So if we have a proposal or an offer that the box is not checked and we have not received a redacted

copy, we handle it in a couple of different ways.

**25:07.881** So first of all, we remind people during the pre-bid, "You need to provide a redacted copy.

**25:14.822** Here's where the clause is. Here's what the statute is. Please make sure you do that."

**25:20.104** If it's an RFP we're going through the evaluation phase and the negotiation phase or we're doing clarification or discussions, we may put a reminder in there

**25:30.375** we may put a reminder in there hey by the way you "hey, by the way, if you didn't submit a redacted copy, please make sure you do so."

**25:36.676** And then after the award, if we get a request and we do not have a redacted copy, the box is not checked,

**25:42.964** We do, in our office, go back to that vendor and say, "We have. A request for your proposal. You have not marked anything as confidential.

**25:52.415** If you do not submit any reductions or confidential offers, this offer will be released to the requester on such and such a day."

**26:01.432** That may be a very short turnaround time, based on the dates. We're gonna talk about those in a second.

**26:08.260** So it may be, "hey, I've gotten a request and if you don't provide a redacted copy to me by tomorrow, your entire proposal is going to be released. And we give them notice.

**26:21.367** Now what happens is we release a copy. It's redacted.

**26:26.471** We get the requester that says, "this is overly redacted and it's too much and I need to see the whole thing."

**26:32.642** So what do we do in that case? Well, Most times, in those cases, we're gonna contact our legal counsel.

**26:41.415** We're gonna say here is what the the bidder proposed as redacted. Here is, you know, the requester that says it's overly redacted.

**26:52.145** What's your advice and guidance on what we should do? We may go back to the original offer and say,

**26:59.263** "It's come our attention that you may have overly redacted your offer. Please take a look and send us a revised redacted copy."

**27:08.287** It may be that, if there is a protest that has been filed, the Chief Procurement Officer

may make the decision to issue a protective order and allow an attorney from a competitor to review an unredacted document under that protective order.

**27:28.174** So, a couple different things can happen, but if you have someone who raises an issue, I would not release anything that was remarked "redacted, confidential, or trade secret" without having a discussion with your General Counsel. You need to let them know.

**27:47.405** If you are going to release something that was marked confidential trade secret you do need to let the vendor know that you are releasing that information before you do that.

**27:58.817** So you need to tell them, "hey, you mark this information as confidential. We're gonna go ahead and release it."

**28:05.524** That vendor may then object and say "I marked it confidential and you can't release it."

**28:10.453** And what you really wanna do is make sure you get your legal counsel and General Counsel involved.

**28:15.197** Because there are penalties for not responding under FOIA. There are also penalties for releasing information under the Trade Secret Act.

**28:23.907** And you're kind of caught in the middle between the two a little bit. So we wanna make sure that what we do is legal and right and the correct thing to do.

**28:33.126** So if you do have any issues raised with what's being redacted, reach out to General Counsel.

**28:41.275** So the other issue that we have when releasing documents: what if I don't have them?

**28:47.140** So again, we are asked, when we respond to a request. We are responding to that request based on what they asked for.

**28:57.938** So for example, if someone comes to our office and says, "I need you to provide me a list of all the purchase orders the state has issued."

**29:07.143** I do not have a list of all the purchase orders that state has issued. So my response is, "I don't have those documents."

**29:14.435** If they ask for a list of all the contracts that my office has awarded, I actually have a list of that.

**29:22.374** That's a report that I run on a periodic basis. So I am able to fill that request.

**29:28.320** But I don't create something that doesn't exist to fill it. I also don't have to, even though I may choose to,

**29:38.104** If all my documents are paper documents - which is very few in the world today, but maybe I do have a document that only exists on paper -

**29:46.656** Maybe they're asking for something that is an older document that we still have. A historical document that was prior to an electronic before keeping things electronically.

**29:58.652** I do not have to create an electronic version, if it doesn't exist. I can provide them a copy.

**30:05.645** You know, hard copy, that sort of thing. I don't have to make it electronic. I may choose to do that, but I'm not required under the statute. And I do have the statute. the reference there and that's under FOIA.

**30:18.766** The other thing is someone may ask me for records that are not kept at my agency.

**30:24.535** So they may ask for a copy of a specific PO. I don't keep POs, the agency does.

**30:30.305** In that case, I'm going to refer that requester to the appropriate agency.

**30:35.451** If an agency gets a request for solicitation documents and a procurement file for a contract that was awarded by our office, they should also refer that requester to our office for those...to submit a request for those documents.

**30:49.825** What we don't wanna do is forward the FOIA request because there are timelines related, and that timeline starts when the request is made at the state.

**31:00.358** So if somebody at The Department of Employment and Workforce gets a FOIA request and it takes them a few days to figure out that, oh no, these aren't documents that we keep.

**31:15.278** These are the documents that are kept at Procurement Services Division or SFAA, and you forward me the email of the FOIA request,

**31:22.415** well, now my time to respond is cut short because of the time that it's in at your agency.

**31:28.039** So what you wanna do is respond to the requester. "I'm sorry, these documents are not in our possession. They are in the possession at State Fiscal Accountability Authority."

**31:37.656** You can refer them to the procurement officer on on the contract. You can refer them to our office, and submit...have them submit the request directly to us for those documents.

**31:53.271** So once I've gone through all that and figured out, "okay, I've got documents, I need to release them, here's what I need to do."

**32:00.063** So you do an acknowledgement of the request. So when you acknowledge the request,

you should respond to the requestor,

**32:06.643** "hey we've received your request date such and such a day." If there's any documents that we're not going to be providing, we wanna say we don't have these documents, you need to get somewhere else, or these documents are exempt from disclosure under FOIA.

**32:21.302** Or "hey, we've got the documents and we're gonna provide them." If you are going to include any FOIA costs, you need to let them know how much it's going to cost and whay they need to do to pay those costs.

**32:34.686** If there's any delay in making the documents available, you need to let that know, let the requester know.

**32:41.240** You can expand the timeframes by mutual agreement. So if you're supposed to provide them within X number of days and both parties agreed to extend that time that is acceptable.

**32:56.481** But you do wanna provide the date when the documents will be provided. Usually that's gonna be, "you will receive your documents no later than X day."

**33:06.866** So what are those dates that I have to do? And there's a couple different dates that we'll go through several of those.

**33:15.184** So first, under FOIA, you have to provide your acknowledgment or your determination within 10 business days if the requested documents are less than 24 months old.

**33:25.805** If the documents are older than 24 months, you have 20 business days to respond.

**33:31.666** Then once you make that acknowledgment, you actually have to furnish the records within 30 calendar days of providing them the notice.

**33:42.423** Providing them the acknowledgment. And that's if they're under 24 months old.

**33:48.190** If they're over 24 months old? You will have 35 calendar days. So, if you look at that,

**33:55.640** if I received a request today, and the documents are less than 24 months old, I have to provide the acknowledgment by November the thirteenth.

**34:05.445** Now that, it counts, I don't count weekends and I don't count better in the Veterans Day holiday in that. That's why it pushes it out to November thirteenth.

**34:13.863** Twenty business days I would respond, acknowledging that response no later than November the twentieth.

**34:22.177** So let's assume I responded on November the thirteenth and said, "hey, I have these documents, we're going to provide them to you."

**34:30.050** The 30 calendar days means I have to provide those documents no later than December the thirteenth.

**34:36.679** So if I got a request today under FOIA, for a document that's less than 24 months old, I have till basically December the thirteenth to respond.

**34:48.152** If the documents are over 24 months old and I responded, I did my acknowledgment on November the twentieth.

**34:56.663** And then I have 35 calendar days to respond. That actually means it is do on Christmas, December the twenty-fifth.

**35:05.215** Of course, all of our state employees will not be working on December the twenty-fifth or on December the twenty-sixth.

**35:11.589** So therefore my documents would be due to the to the requester on the twenty-seventh, which is the next business day that we are in the office.

**35:21.626** So then the question is what if I did not acknowledge the document? So if you did not send an acknowledgement saying that we have the documents or we don't have the document,

**35:31.390** then by default, the request is considered valid and should be filled. And you have those same time frames to respond.

**35:42.470** So then there's a little bit different response time. That's standard FOIA. But when we're talking about procurements and solicitations, we do have some different response times.

**35:53.945** So under the Procurement Code, disclosure of procurement information, if you have records that are related to awards, those must be made available to inspection at the office of the responsible procurement officer within five calendar days.

**36:10.776** Now, the key for this is: this is only for bidders or contractors on that award or subcontractors.

**36:22.405** So if it is a request that is made by someone who did not submit an offer, we would fill that request under the normal FOIA timelines.

**36:34.480** If it is a request that is made by an offeror, then we do need to make those available for inspection at the office.

**36:41.694** Now, that means I can say, "listen. I don't have time to scan them and get into you, but you can come to my office and look at them."

**36:51.073** That is fine, but you have to supervise the person while they're inspecting your records. You can't just give them the file and send them to an office.

**37:02.506** And you need to supervise and be with them while they do that. So in a lot of cases, it's easier just to scan them and email them, or copy them and provide them within the five calendar days.

**37:13.131** So if I had a request for a... if I did an intent to award on Monday and I'm still within my protest period, and I get a request today, requesting document,

**37:28.270** I've got 5 calendar days which counts Saturday, Sunday, Monday, Tuesday, Wednesday.

**37:33.706** So I have to have those done by Wednesday. So you need to, when you're doing your intents to award and you're doing those FOIA requests, you need to account for those days.

**37:44.651** So if I post an intent to award on the nineteenth of December, and a vendor sends me a FOIA request on Thursday the twenty-first.

**37:56.153** my five calendar days is actually going to be Friday, Saturday, Sunday, Monday, Tuesday, which is the twenty-sixth.

**38:03.145** So I'm gonna have to be able to provide those documents to them on the twenty-seventh, which is the date first day back after Christmas holidays.

**38:11.308** Holidays and so you need to make sure that when you're doing contract awards, those timeframes can't be short. You want to want to be able to have those documents available for inspection or for distribution if they are requested.

**38:28.391** So the next thing that we have is FOIA fees. So this is a requirement under FOIA and it's in section 30-4-30(B).

**38:41.629** So what that says is the state may establish and collect reasonable fees not to exceed the actual cost of the search retrieval and redaction of the records.

**38:51.543** You should, if you're going to establish fees for a FOIA, You need to have a fee schedule that's posted online.

**38:57.382** So when you get a request for something that's a very large request, then you want to utilize that fee schedule.

**39:05.958** You would notify the requestor in your acknowledgment that this is what the...you've requested these documents.

**39:13.589** Based on the volume of the documents, your fee will be

**39:17.925** you know, \$150, \$500, whatever that fee calculates out to be. Notify them at the estimated cost.



**39:26.241** You may actually say, "we won't fill this until you pay it in full." Or you may say, "we'll begin filling it once you make a 50% deposit," or a 10% deposit, whatever your policy allows for

**39:39.980** And then they'll pay for the balance after they received it. So the key to these fees are you cannot make them exorbitant so that a person you know...it can't exceed the cost of you to do the work.

**39:55.398** And it's not a it's not meant to hinder someone from requesting. Though it may limit what they request.

**40:05.079** It has to be based on the actual cost. So you have to copy the records and it costs you, you know, a penny per page that's what your FOIA fees should be.

**40:16.342** If you have to mail them out and it, cost you X dollars to send a package, that's what your fee should be.

**40:25.558** You can charge these for the people who are reviewing and pulling and copying the records. That is to be based on the lowest salary of the person that's doing the work.

**40:36.919** So if you have a, maybe you have one person that does the review. The lowest salary of the level of person who would be doing that review, you would use that salary for the hours.

**40:50.750** And then if you have a different person that actually pulls it: so maybe somebody in the General Counsel's office or the Procurement Office reviews it.

**40:58.553** And then you have a file clerk that pulls records. You would look at those salaries in order to determine what your FOIA fees are.

**41:07.804** And so what happens if I don't comply? Well, There are penalties, and there is civil liability under both FOIA and the South Carolina Trade Secrets Act.

**41:18.769** So if you're found and in violation of FOIA you can have up to a \$500 fine. You may also be responsible for attorney fees and the cost of any litigation.

**41:28.942** If you are in violation of the South Carolina Trade Secrets Act, there can be up to a \$100,000 fine.

**41:35.240** And the South Carolina Trade Secrets Act also has criminal penalties, which will, if you violate that can result in up to 10 years in imprisonment.

**41:45.007** So this is why we really want to make sure...The Trade Secrets Acts' consequences are much higher.

**41:52.558** So that's why we really want the vendors to make the...a determination of what is privileged confidential trade secret.

**42:01.003** We want them to make those redactions and make those markings for us.

**42:07.766** And again, if there is any question or concern that something is overly redacted, or shouldn't be released, that's when we really wanna get our General Counsel's office involved

**42:19.015** and ask their opinion before we release anything that was marked. confidential or trade secret, because the consequences are fairly significant.

**42:32.921** And that is the end of my presentation. I'm open for questions. I do think we have some in the chat.

**42:38.325** So let's look and see if we can see what we have here.

**42:44.980** So we've got, Does anyone charge for FOIA requests? If so, how much?

**42:51.093** Tripp: yes they do have a instances where they charge for very large requests. Typically they are explained on the FOIA page on our website. So the requirement for charges is in the FOIA statute, you do have to pay those publicly online.

**43:06.216** So you should be able to go to an agency's website and see if there are any charges and what people are charging.

**43:13.855** So what, really what you wanna do is you wanna look at, you know, copying costs used to be really easy to do because everybody knew how much they pay for their copiers.

**43:23.377** Of course, with everything electronically these days, it's gonna be related to, you know, the time it takes for the person to find the file,

**43:33.345** scan it electronically if it's not already scanned and then get it distributed if it has to be emailed, or does it have to be uploaded to a Dropbox or a file share site.

**43:45.470** In our office, of course, some of our proposals get very large, so we can't just email them. So we have to have a Dropbox site or a secure site to transfer those files.

**43:56.964** So that takes time to get those uploaded and to figure out how much those are.

**44:06.050** Any others questions or comments on FOIA?

**44:16.733** Okay, so we've got a question about the number of requests and providing existing contract info for current services when you have the solicitation open.

**44:23.762** Those are, that is allowable, the information on the current contract can be released.

**44:30.025** You cannot release anything, of course, related to the solicitation that's open. But that existing contract information, you would fill that request based on the standard FOIA statute and timelines.

**44:42.501** So you would review the request to make sure that, you know, the information that you have is publicly available and can be or can be released and not withheld.

**44:54.895** But the timelines are based on those FOIA timelines. So those are the I've got 10 or 15 business days to respond depending on the age

**45:04.904** And then you have either 30 or 35 days to fill it based on the the age of the document.

**45:13.067** So typically if you're doing a...if they're looking for the contractual documents on the current solicitation it is probably gonna be 2 years or older.

**45:22.881** So it's those longer time frames. In some cases it may be they request it and it's not filled before this solicitation would be issued. The current solicitation would be open, but that's just the way it is.

**45:39.519** The recent...somebody asked that these were recent changes to the response timeline requirements

**45:44.401** The changes on the 5 business...the 5 calendar days on procurement awards that came into being in the procurement code in 2019

**45:57.825** So when the changes were made on the intent to protest and the protestand reduced it from 10 days to 7 business days,

**46:10.754** Because that timeframe was reduced to do the intent to protest, hat's when the public disclosure of information was dropped down to 5 calendar days.

**46:19.942** So that, vendors would be able to get some information and know whether they want to file a protest or not. So that did just change in 2019.

**46:35.165** Okay, so we've got one that said they received a lot of emails requesting bid information, but the requests are usually not a formal FOIA request.

**46:42.659** I respond by receiving the question email with the link to our bidding platform is open to the public. Is that okay or should I refer them to our FOIA link?

**46:49.518** I think that's fine if they were, you know, they're asking for bid information and it is publicly available on the website. I think that's more a general request and you can send them the link and they should be able to get it.

**47:02.129** Okay, Margaret's asked about the 24 months plus or minus timeline. I'm not sure when...that's in the FOIA statue and I'm not sure when the last time that was updated.

**47:11.564** so I can't answer the question, Margaret, if the 24 months is new or not. I'd have to look that up.

**47:20.823** So

**47:24.329** Yeah, and if somebody calls and asks, I mean, a verbal call is not a formal FOIA request.

**47:31.541** But if someone calls and says You know, "where can I find your solicitations," or "where can I find bid information?"

**47:38.153** Again, I don't treat that as a formal FOIA request. I just refer them to where it is on the website.

**47:43.141** Because that will maybe avoid a FOIA request. You don't wanna, you know, the whole point of FOIA is transparency.

**47:52.400** And so when people ask us for information, we do wanna release it as quickly as possible, knowing that we have 35 days on documents that are older than 24 months once we make the acknowledgment.

**48:06.177** Sometimes we are right at that 35 days. Often, we will fill those requests much sooner.

**48:14.624** With things being electronically is sometimes easier to pull that information. And our goal is to get it out and off our desk as quickly as possible.

**48:23.742** So we may come closer to that timeline in some cases than others, depending on what's going on.

**48:37.377** Alright, do we have any other questions?

**48:53.624** Alright, I don't see any other questions that have come in, so I will thank everybody for their time.

**49:01.473** We finished a few minutes early. We will be doing a recording and a copy of the presentation will be on our website. It's the same location where we have our previous webinar recordings.

**49:13.520** So they will be made available and if you have any questions in the meantime, please let us know. We're always here to help. Thank you.