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## Responding to Requests under the Freedom of Information Act (FOIA)

### Introduction to FOIA

Although, as a private institution, Duke University is not directly subject to the Freedom of Information Act (5 U.S.C. § 552) (or other state/local sunshine laws), the federal agencies that provide funding to Duke investigators are required to disclose certain materials. These agencies must make records promptly available upon request, unless there is a basis for exempting or excluding the records.

FOIA provides that any person has a right to access any federal agency record, unless the records—or portions of the records—are protected by one of nine exemptions or one of three special law enforcement exclusions.

### FOIA Requests for Federally Funded Grant Applications

Under FOIA, any person may request a federally funded grant application and/or related materials from an agency such as NIH or NSF. Before releasing a funded grant application, the relevant agency will consult the grant recipient for advice concerning information that would be an invasion of personal privacy, contain confidential and/or commercial information, or be otherwise protected. If the redactions requested by the grant recipient are properly exempted from FOIA, the agency will remove that information before releasing the application or other materials to the requester.

### Duke University/Duke University Health System FOIA Procedures

If a Duke investigator receives a FOIA request the following procedures should be followed:

1. No objection to disclosure of the requested materials and no redactions necessary
  - PI signs off for the release of records
2. Only redactions are personal privacy reasons (see list below)
  - PI signs off for the release of records
  - Office of Research Support (University) or Office of Research Administration (SoM) requests that the agency make the standard redactions pursuant to Exemption 6

3. Redactions are necessary to protect confidential and/or commercial information (see list below)
  - PI signs off for the release of records
  - ORS or ORA consults with the Office of University Counsel before responding

### *Explanation of Procedures*

In all cases, the PI should first review the requested materials and identify which information, if any, should be redacted pursuant to the exemptions described below.

Where the requested materials can simply be released and no redactions are required, the PI after consultation with the responsible research office may sign the release and send it to the agency.

In many cases, the requested materials will contain information for which disclosure would be a clearly unwarranted invasion of personal privacy (see list below). Where only typical redactions for reasons of personal privacy are required, ORS or ORA should respond on behalf of the PI, requesting that the Agency make standard personal privacy redactions pursuant to Exemption 6. Unless ORS/ORR has specific concerns as to whether personal information will be removed under Exemption 6, the office is not required to consult with the Office of University Counsel.

Where the requested materials contain confidential and/or commercial information pursuant to Exemption 4, which may include any proprietary or intrinsically valuable information (see list below), ORS/ORR should consult with the Office of University Counsel before responding to the FOIA request. Depending on the level of concern, either ORS/ORR or the Office of University Counsel may handle the matter on behalf of the PI. Exemption 4 protects any information which, if released, would adversely affect Duke University or Duke University Health System's competitive position. Thus, it is essential to demonstrate both the value of the information to Duke and any steps taken to protect the confidential and/or commercial nature of the information.

Where the agency has not provided a copy of the FOIA request, the PI or ORS/ORR should ask the agency for a copy of the request, or at a minimum, the requester's name and organizational affiliation.

### **Common Exemptions from FOIA Disclosure**

In the context of a FOIA request for a grant application, the most common exemptions fall into two of the nine categories: unwarranted invasion of personal privacy (Exemption 6) and confidential and/or commercial information (Exemption 4).

1. Unwarranted invasion of personal privacy may include:
  - Names and titles of individuals (other than the PI or other key personnel)
  - Salary and salary-related information

- Social security numbers
  - Birthdates or ages
  - Minority-group status
  - Marital status
  - Individuals' work or home addresses
  - Email addresses
  - Phone numbers
  - Signatures
  - Information relating to individuals' performance evaluations
  - Any other information contained in personnel files or individuals' medical files
  - Names of buildings and locations
  - Source of support from any non-public sources
  - Information regarding pending or non-final support
  - Any other personal information
2. Confidential and/or commercial information may include information concerning
- Trade secrets
  - Patent or other valuable commercial rights
  - References to unpublished material
  - Confidential financial information
  - Privileged information
  - Any other proprietary or intrinsically valuable information

### **Other Exemptions and Exclusions from FOIA Disclosure (uncommon)**

Where one of the following FOIA exemptions may apply, the PI or ORS/ORR should consult with the Office of University Counsel.

3. Information classified or specifically authorized to be kept secret in the interest of national defense or foreign policy, pursuant to an executive order
4. Related solely to the internal personnel rules and practices of an agency
5. Specifically exempted from disclosure by another statute
6. Certain inter-agency and intra-agency communications
7. Law enforcement records
8. Reports for an agency responsible for regulating or supervising financial institutions
9. Maps or other data concerning wells

## Template Language

### 1. No objection to disclosure and no redactions necessary

Duke University has no objection to the production of the attached \_\_\_\_\_ (document type) submitted under the \_\_\_\_\_ funding opportunity numbered \_\_\_\_\_, in response to \_\_\_\_\_'s FOIA request.

### 2. FOIA request and/or requester's name and affiliation have not been provided

Please send us a copy of the FOIA request, or if the request is unavailable, the requester's name and organizational affiliation.

### 3. Redactions for personal privacy reasons

I am confirming that Dr. \_\_\_\_\_ stated he/she would sign the PI release form and email it back to you. Further, Dr. \_\_\_\_\_ has stated that no redactions are needed beyond the data normally redacted pursuant to 5 U.S.C. § 552(b)(6), concerning the release of any and all personal or private information regarding individuals contained in the documents, including without limitation, names and titles of individuals (other than the PI), addresses, names or buildings and locations, email addresses, phone numbers, salary-related information, evaluative remarks, or any other personal information of all individuals (including the PI) or information that could be used in connection with other available information to identify or locate specific individuals or personal information related to such individuals as an unwarranted invasion of privacy.

### 4. Confidential and/or commercial information

Pursuant to 5 U.S.C. § 552(b)(4), portions of the requested documents have been redacted to protect confidential, unpublished, proprietary and intrinsically valuable information which, if released, would adversely affect the patent rights and commercial interests of the Grantee and its researchers.

#### *a) Intrinsic value of the commercial information*

The redacted portions of the documents regarding \_\_\_\_\_ represent technical innovations that the Grantee intends to patent. The grantee intends to license the technical innovations of this research, and disclosure to a market competitor would result in substantial harm to the Grantee. The technology and technological information will lose its intrinsic value if it is freely available, because there would no longer be any reason to license it from the Grantee and its value will be effectively reduced to nothing.

#### *b) Confidential nature of the commercial information*

The information contained in the requested documents relating to \_\_\_\_\_ has not been disclosed publicly, and thus remains confidential. The Grantee is continuing to assess the potential of this information for protection under a patent or some other form of protection as intellectual property, so further analysis will be necessary. Failure to

keep the Grantee's information confidential can severely and negatively impact the Grantee's ability to secure patent protection for any new intellectual property. Such impact would result in irreparable harm to the Grantee by destroying the intrinsic value of such intellectual property and run counter to the intent of the Bayh-Dole Act of 1980, which provides that universities can pursue ownership of intellectual property in preference to the government and gives universities control of intellectual property that results from federally funded research.

Additionally, the Grantee's researchers have not yet had the opportunity to publish this information because of its current confidential nature. Thus, non-disclosure of this information is requested to protect its potential value as intellectual property and to protect future publication rights of Grantee's researchers with respect to this information.