



July 19, 2023

Via Email to: laila.ouhamou@nasa.gov

National Aeronautics and Space Administration (NASA) Headquarters
300 E Street SW, Rm. 6087
Washington, DC 20546
Attention: Ms. Laila Ouhamou

RE: NASA Grants FOIA RFI

Dear Ms. Ouhamou:

COGR is an association of over 200 public and private U.S. research universities and affiliated academic medical centers and research institutes. We focus on the impact of federal regulations, policies, and practices on the performance of research conducted at our member institutions, and we advocate for sound, efficient, and effective regulation that safeguards research and minimizes administrative and cost burdens. We write today to comment in response to “NASA’s Request for Information: Freedom of Information Act (FOIA) Disclosures: Proposed NASA Grant Application Marking for FOIA Disclosure-Exempt Material,” which was published on June 27, 2023, in the Federal Register ([88 FR 41662](#)).

COGR and its member institutions understand the significance of the Freedom of Information Act (FOIA) to ensuring that members of the public can obtain federal funding agency records related to research grants. We also appreciate the importance of the various exemptions to FOIA disclosure specified in [Title 5 U.S.C. Section 552\(b\)\(1\)-\(9\)](#), particularly the exemption for confidential business information (“CBI Exemption”) that institutions may assert to protect “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹

We are concerned, however, that *requiring* institutions to indicate in grant applications what information qualifies for the CBI Exemption before any FOIA request has been filed is inconsistent with current legal requirements governing the FOIA process. Such a requirement would add excessive and unnecessary burden to the grant proposal and FOIA processes without decreasing FOIA response times. Accordingly, we urge NASA to refrain

¹ [5 U.S.C. §552\(b\)\(4\)](#).

from making this change to its processes. Instead, we encourage NASA to maintain current FOIA processes² that *permit* – but do not *require* – researchers to designate confidential commercial information at the time of submission and that provide institutions with notice, and an opportunity to object, at the time an FOIA request is received.

Our recommendation to maintain current FOIA processes is consistent with Executive Order 12600 - *Predisclosure notification procedures for confidential commercial information*.³ This Executive Order states:

[T]o the extent permitted by law, [agencies shall] establish procedures *to permit* submitters of confidential commercial information to designate, *at the time the information is submitted to the Federal government or a reasonable time thereafter*, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm.” [*Emphasis added.*]

This Executive Order also requires federal agencies to notify information submitters when an FOIA request is received that may encompass the CBI and afford the submitter an opportunity to object to its disclosure. The current NASA FOIA regulations set forth such a process.⁴

Researchers are already free to designate in grant applications information that they know at the time of submission is proprietary and confidential. They should be permitted to continue this practice without the necessity of analyzing all information in the application to determine whether it falls within the scope of an FOIA exemption. Further, as discussed below, the status of information as CBI may change over time.

Additional details of our concerns are set forth in response to the specific RFI questions below.

(1) What impacts would this grant application requirement have on your organization?

Requiring applicants to “indicate areas in their grant applications that they believe fall under” the CBI Exemption would significantly increase the burden on institutions in preparing grant applications without fulfilling NASA’s “expectation” that this advance “marking” will enable NASA to respond more promptly to FOIA requests for grant information.

Grant proposals are prepared by scientists and the research administrative personnel who support them. If these individuals *know* that they are submitting confidential and proprietary information in a grant application, they can designate it as such. However, the review of the entire grant application to determine all instances in which the FOIA CBI Exemption may appropriately be applied requires legal and regulatory knowledge that scientists and associated research administrative personnel do not possess.

² 14 C.F.R. Chapt. V, Part 1206. See, generally, NASA, [FOIA webpage](#) (last updated May 11, 2023).

³ (June 23, 1987) (52 FR 23781).

⁴ 14 C.F.R. Part 1206, Subpart F.

Typically, when an institution receives notice from a federal agency that a FOIA request has been received for grant proposal materials that may contain CBI, the institution's legal counsel and/or compliance office work with the researchers who submitted the proposal to review the requested documents and determine what information contained in those documents constitutes CBI. The institution then marks the requested documents to indicate CBI, and submits them to the agency, along with a written explanation as to why the marked information qualifies for the CBI Exemption. This is a painstaking process that involves close review of the documents requested and careful consideration of regulatory guidance and case law that supports application of the CBI Exemption in specific circumstances.

Further, the CBI Exemption must be considered at the time of the FOIA request because circumstances at the time of request impact the exemption's applicability. Thus, the proposed policy assumes time saving in FOIA responses, but this is a theoretical assumption at best. For example, if a researcher designates confidential information as CBI in a grant proposal and subsequently publishes that information, the information would no longer be considered CBI. Similarly, whether a grant is awarded, as well as the course of the resulting research, can impact the status of information as CBI (or even whether the information is subject to FOIA⁵). Accordingly, a CBI analysis must always be performed at the time of the FOIA request. No efficiency is gained by requiring that institutions also perform this analysis at the time of the grant application.

In summary, institutions do not have the requisite amount of personnel and time to undertake the CBI review process at the proposed scale, which encompasses grant applications that may never be funded and FOIA requests that may never be filed.

(2) Should NASA keep the same page limits if applicants must mark FOIA-exempt portions of applications?

(3) If page limits should be increased, how many pages would enable your organization need to mark the FOIA-release exempt portions?

In response to both questions, page limits must be increased to accommodate marking of all materials in grant applications that are potentially covered. However, the additional number of pages needed will depend on whether NASA expects institutions to merely mark information with the applicable exemption or if they also must provide written factual and legal support for their CBI designations.⁶ If such factual/legal support is required, then a substantial page limit increase would be required. Alternatively, the designation of information subject to the CBI Exemption, along with any required written support for the designation, could be included in a separate section of the application that is not counted toward the grant application's page limits.

⁵ An unfunded grant proposal may not even be subject to an FOIA request. *See, e.g.*, NIH Grants Policy Statement, Section 2.3.11.2.2 (NIH will generally withhold unfunded grant applications in response to an FOIA request).

⁶ *See*, 14 C.F.R. §1206.602(a) ("If a submitter has any objections to the disclosure of commercial information, the submitter must provide a detailed written statement to the FOIA office that specifies all factual and/or legal grounds for withholding the particular information under any FOIA exemptions.")

(4) What else should NASA consider in its development of guidance surrounding FOIA for NASA grants and cooperative agreements?

NASA's current regulations implementing the FOIA Act⁷ already include detailed processes and timelines for the expedient processing of FOIA requests and assertion of the CBI Exemption.⁸ These regulations include requirements for agencies to notify submitters that CBI has been requested via FOIA and a maximum 10-day limit for responding to these notices. Guidance for grant applicants and awardees that plainly and succinctly summarizes the CBI Exemption and the process and timeline for asserting the exemption would assist applicants/awardees in understanding and fulfilling their responsibilities in the FOIA process.

Conclusion

When a grant application is submitted, there is great uncertainty as to facts and circumstances that bear on whether information in the proposal qualifies for the CBI Exemption, or even, whether the grant proposal will go unfunded and *not* be subject to FOIA. Researchers are already permitted to designate information in a proposal that they know at the time of submission is proprietary. However, if institutions are required to designate *all* potential CBI in a grant proposal at the time of application, it will not only require significant effort and resources, but also produce inaccurate classifications that are over- or under-inclusive because CBI classifications can change over time. Further, agencies are required to notify submitters when CBI is encompassed by a FOIA request and afford them an opportunity to object. In short, a CBI review will always need to be completed at the time of a FOIA request. Consequently, requiring CBI review also be completed at the time of the grant proposal will not reduce FOIA request response times. **For these reasons, COGR urges NASA to reconsider implementing this requirement, and instead, continue under the current FOIA processes described in the NASA FOIA regulations.**

We appreciate the opportunity to submit these comments. Please contact Kristin West, COGR's Director of Research Ethics and Compliance or me should you have any questions regarding this transmittal.

Sincerely,



Matt Owens
President

⁷ *Supra*, n. 4.

⁸ *See, e.g.*, 14 C.F.R. §§1206.601 – .603.