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April 11, 2023

MEMORANDUM FOR DOD FOIA PUBLIC LIAISONS AND FOIA ACTION OFFICERS

SUBJECT: Guidance on the Use of Freedom of Information Act (FOIA) Exemption 4 for
Production Assistance Agreements, Scripts, and Script Notes

DoD FOIA Requester Service Centers (RSC) may receive FOIA requests for records concerning DoD engagements with motion picture, television, and other entertainment media companies (“production companies”). DoD’s arrangements with these companies are memorialized in a Production Assistance Agreement (PAA), which specifies the terms under which DoD provides certain support for an entertainment media project such as a motion picture, documentary, or television show, pursuant to DoD Instruction 5410.16. FOIA requesters seeking information about these arrangements often request the PAAs themselves, as well as scripts submitted by the production companies and script notes that DoD provides to the companies.

Because these documents may contain confidential or privileged commercial information submitted by a production company, RSCs processing requests for these records must consider the application of FOIA Exemption 4, 5 U.S.C. 552(b)(4), to such records. Exemption 4 protects trade secrets and commercial or financial information obtained from a person (outside of the government) that is privileged or confidential.

To determine whether to apply Exemption 4, RSCs should follow the submitter notification process outlined in DoD Manual 5400.07, which states “when the DoD Components receive FOIA requests for information that could be protected by [Exemption 4], they will notify the submitter of the information in accordance with the procedures in Subpart 286.10 of Title 32, CFR.” This process allows RSCs and Initial Denial Authorities (IDAs) to consider input from submitters as to whether the information meets the criteria for Exemption 4 and provides submitters advance notice and an opportunity to formally object if the agency decides to release information the submitter considers commercially sensitive.

The Component IDA will consider the submitter’s input, if any was provided, in making the final determination regarding release. IDAs are not required to follow the submitter’s opinion and must determine whether a submitter’s arguments for non-release meet the standards for protection under Exemption 4. Should an IDA decide that it is appropriate to release information the submitter objects to disclosing, advance notice to the submitter is required to allow it time to file a lawsuit enjoining the agency from releasing the information, (known as a Reverse FOIA suit). In determining whether Exemption 4 should be applied to a PAA, scripts or script notes, IDAs should consider whether the entertainment media project has already been released to the public for viewing.

For FOIA requests seeking PAAs, scripts, or script notes, RSCs must use the submitter notification process. Because Exemption 4 is designed to protect the interests of non-governmental third parties, it is critical that DoD follow the submitter notification procedures exactly to ensure the rights of those parties are protected at every stage of the FOIA decision process. Failure to follow these procedures may contribute to a lack of trust by production companies and other commercial organizations in DoD's handling of confidential or privileged commercial information.

Lyn M. Kirby
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and Freedom of Information