

Client Alert

Small Business Administration Paycheck Protection Program – Guidelines for Public Transparency

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Companies participating in the Small Business Administration (SBA) Paycheck Protection Program (PPP) can look to the SBA's Freedom of Information Act (FOIA) protocol to determine what information may be accessible by the public. Participation in these programs has fluctuated as Treasury and SBA guidance on loan eligibility has evolved. Public companies, holding companies with both US and foreign operations, small businesses backed by private equity owners, restaurant chains or franchises, and large nonprofits, even if they meet the formal legal requirements to receive PPP loans, have sparked concerns about program eligibility, especially as many smaller, less well-capitalized "mom and pop" businesses did not receive funding in the first round of SBA PPP lending before the initial funding was exhausted. Congress has included provisions for oversight and transparency into the Coronavirus Aid, Relief, and Economic Security (CARES) Act and related legislation. As part of this transparency, federal agencies, such as the SBA may be subject to FOIA requests. Below is a summary of the applicable guidelines.

The Freedom of Information Act and the Small Business Administration

The following information details how the Small Business Administration applies the Freedom of Information Act¹. Each federal agency handles FOIA request by their own rules and regulations.² This guide pertains only to the SBA's handling of FOIA requests. The SBA's full disclosure information regulations can be found at 13 CFR 102.³

Freedom of Information Act

The Freedom of Information Act took effect on July 4, 1967. The Act intends to make available to the public all existing federal government records unless they are protected from disclosure by any of the nine FOIA exemptions or the release of such information would cause specific harm. Any person can request access to federal agency records.

¹ The Freedom of Information Act can be found in full at <https://www.justice.gov/oip/blog/foia-update-freedom-information-act-5-usc-sect-552-amended-public-law-no-104-231-110-stat>

² These and other examples provided throughout this memorandum are quoted from SBA guidance, with light edits to conform to the context of this document. See <https://www.sba.gov/about-sba/open-government/foia>

³ <https://www.ecfr.gov/cgi-bin/text-idx?SID=50ff66d5d1cc9357d5f4ce114fcc5c79&mc=true&node=pt13.1.102&rgn=div5>

There are two levels of administrative review for FOIA requests, initial and appellate. Upon exhaustion of both, a requester may seek judicial review.

Information Generally Exempt from Disclosure

Determinations regarding the disclosure of records is based on business status and the relation of the requester to the information. A first party requester (i.e., the submitter of the information or the subject of the record) will be privy to more information than a third party (anyone other than a first party). Disclosure of segregable records is required.

- Non-statistical information on pending, declined, withdrawn, or canceled applications.
- Non-statistical information on defaults, delinquencies, losses, etc.
- Loan status, other than charged-off or paid-in-full.
- Home disaster loan status and interest rate.
- Personal and business tax returns.
- For viable on-going businesses: financial statements, credit reports, business plans, plant lay-outs, marketing strategy, advertising plans, fiscal projections, pricing information, payroll information, private sector experience and contracts, purchase information, banking information, corporate structure, research plans, and client list of applicant/recipient.
- For viable on-going businesses: commercial and financial information contained in Certificate of Competency records, Requests for Size Determinations, 8(a) Business Development Plans, loan applications, SBIC applications, and loan officer's reports.
- Internal documents not incorporated into final Agency action, pending internal recommendations on applications for assistance, SBA/attorney-client communications, pending litigation documents, and investigatory documents. Discretionary disclosure policy must be utilized.
 - FOIA does not directly prohibit disclosure. Under the SBA's discretionary policy, the SBA must release requested records, or portions thereof, although technically exempt, unless (1) some other law would be violated or (2) some legitimate public or private interest would be harmed.
 - To determine whether a document should be released, the SBA applies the DOJ "Foreseeable Harm" standard, whether or not the information in question technically or arguably falls within the scope of an exemption.
 - Agencies "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."
 - Agencies shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested records is not possible."
- Personal history and financial statements, tax forms, resumes, all non-government career experience, communications regarding applicant's character, home and email addresses and telephone numbers, social security numbers, birth dates, and medical records.
- Portions of inspector general reports, audit reports, program investigation records and any other records which, if released, would interfere with the Government's law enforcement proceedings and/or would reveal the identity of a confidential source and documents relating to pending litigation and investigations.
- Financial information on portfolio companies.
- Information originating from other agencies should be referred to those agencies for disclosure determinations.

Information Generally Releasable

- Names and commercial street and email addresses of recipients of approved loans, SBIC licenses, Certificates of Competency, lease guarantees, surety bond guarantees, and requests for counseling.
- Names of officers, directors, stockholders, or partners of recipient firms.
- Kinds and amounts of loans, loan terms, interest rates (except on home disaster loans), maturity dates, general purpose, etc.
- Statistical data on assistance, loans, defaults, contracts, counseling, etc.
- Decisions, rulings and records showing final Agency actions in specific factual situations if identifying details exempt from disclosure are first deleted.
- Awarded contracts: name of contractor, contract amounts, contract dates, and contracting agencies.
- Identity of participating banks.
- List of 8(a) participants, date of entry into the 8(a) Program, projected graduation date from the 8(a) Program, and North American Industry Classification System codes.
- OHA opinions and decisions, grievances in redacted form.
- Names of SBA employees, grades, titles, and duty stations.

Records Protected by the Nine FOIA Exceptions

In response to a FOIA request, existing records will be disclosed unless the information is protected by one or more of the nine FOIA exemptions cited in the Act as 5 U.S.C. §552(b) (1) through (b)(9):

- Exemption (b)(1): records that are currently and properly classified in the interest of national security
- Exemption (b)(2): records that relate solely to the internal personnel rules and practices of an agency
- Exemption (b)(3): records protected by another law that specifically exempts the information from public disclosure (the specific statute must be cited)
- Exemption (b)(4): trade secrets and commercial or financial information obtained from a person which would cause substantial competitive harm to the submitter if disclosed
- Exemption (b)(5): inter-agency or intra-agency records that are deliberative in nature and are part of the decision making process that contain opinions and recommendations
- Exemption (b)(6): personnel and medical files and similar files the disclosure of which would constitute an unwarranted invasion of individual privacy
- Exemption (b)(7): investigatory records or information compiled for law enforcement purposes
- Exemption (b)(8): records for the use of any agency responsible for the regulation or supervision of financial institutions
- Exemption (b)(9): records that contain geological and geophysical information (including maps) concerning wells

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