



## **Treatment of Confidential Materials – October 29, 2019**

Confidential business information shared with the Loan Programs Office (LPO) is protected by Federal laws, regulations and Department of Energy (DOE) policies. LPO understands the importance of protecting business sensitive information shared by applicants or potential applicants for a loan or loan guarantee. LPO enforces the Federal laws and regulations that protect this information and has adopted strict policies to ensure that confidential business information remains private and secure.

LPO often receives requests to sign non-disclosure agreements (NDAs) with applicants or potential applicants. As a matter of policy, DOE does not permit LPO or its Federal employees to enter into NDAs. Rather, all Federal employees at the Department of Energy (DOE) are bound by the [Trade Secrets Act \(18 U.S.C. 1905\)](#). The Trade Secrets Act makes Federal employees criminally liable for sharing business-sensitive information with anyone outside of their respective agencies. Under the Trade Secrets Act, Federal employees are barred from engaging in the unauthorized disclosure of “information [that] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” Violations of the Trade Secrets Act may result in the loss of employment, fines and imprisonment.

In addition to this criminal statute, the LPO enforces its own strict privacy policy which limits the distribution of confidential business information to only those Federal employees on a need-to-know basis. Therefore, even within LPO and DOE, access to confidential business information is restricted from wider distribution.

LPO routinely engages external consultants and contractors to evaluate materials submitted in connection with an application or pre-application materials. It is important to note that external consultants and contractors are not subject to the Trade Secrets Act. However, LPO does not share an applicant’s or potential applicant’s business sensitive information with its consultants and contractors unless two conditions are met: (i) LPO has obtained the applicant’s or potential applicant’s consent to share such information; and (ii) the external consultant has agreed to keep all information shared in the evaluation process confidential pursuant to an NDA. As an additional precaution, an applicant or potential applicant may separately and directly enter into an NDA with the consultants and contractors engaged by the LPO.

As a Federal agency, DOE and LPO must comply with requests made pursuant to the [Freedom of Information Act \(FOIA\) \(5 U.S.C. 552\)](#). Under FOIA, Federal agencies are required to disclose agency records requested by a member of the public, including information received from outside parties, unless FOIA specifically exempts the information from disclosure. [FOIA Exemption 4](#) (5 U.S.C 552(b)(4)) exempts confidential commercial and financial information



submitted by applicants or potential applicants from disclosure. Therefore, LPO will be required to release information received from an applicant or potential applicant unless such information is confidential commercial and financial information.

Upon LPO's receipt of a FOIA request for materials submitted by an applicant or potential applicant, LPO will (i) review all materials submitted by the applicant or potential applicant, (ii) propose redactions pursuant to the relevant FOIA exemptions, and (iii) afford such applicant or potential applicant the opportunity to review and comment on LPO's proposed redactions. Please note that the final decision with respect to the redaction of the materials resides with LPO.

To facilitate the process of identifying and protecting confidential information exempt from disclosure under FOIA, applicants and potential applicants are advised to mark every page that contains confidential information as follows:

*May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.*

Further, applicants and potential applicants are advised to mark the first or cover page of each document or individual file, as applicable, as follows:

*Notice of Restriction on Disclosure and Use of Data*

*Pages [ ] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and is exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.*

Finally, pages that clearly do not contain trade secrets or commercial or financial information should be left unmarked.

LPO takes very seriously the confidentiality of all borrowers, applicants and prospective applicants and will endeavor to protect it to the fullest extent permissible under Federal law. If you have any further questions or concerns, a meeting or conference call with LPO internal counsel may be arranged.