

SECTION 36 – COMMUNICATIONS WITH CONGRESS AND THE PUBLIC AND CLEARANCE REQUIREMENTS

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36.1 Confidentiality of budget deliberations.

The nature and amounts of the President’s decisions and the underlying materials are confidential. Do not release them outside of your agency until the budget is transmitted to Congress. Presidential decisions on current and budget year estimates (other than forecasts of items that will be transmitted formally later), both in total and in detail, become the “proposed appropriations” as that term is used in the Budget and Accounting Act of 1921, as amended, and must be justified by your agency. Do not release agency justifications provided to OMB and any agency future year plans or long-range estimates to anyone outside the executive branch, except in accordance with this section.

36.2 Congressional testimony and communications.

The Executive Branch communications that led to the President’s budget decisions will not be disclosed either by the agencies or by those who have prepared the budget. In addition, agency justifications provided to OMB and any agency future year plans or long-range estimates will not be furnished to anyone outside the executive branch, except in accordance with this section.

When furnishing information on appropriations and budgetary matters, you (and your agency representatives) should be aware of the following limitation on communications:

“... An officer or employee of an agency may submit to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the government only when requested by either House of Congress.” (31 U.S.C. 1108)

You should also be aware of restrictions on communications to influence legislation that are not conducted through proper official channels (18 U.S.C. 1913).

After formal transmittal of the budget, an amendment, or a supplemental appropriation request, the following policies apply when testifying before any congressional committee or communicating with Members of Congress:

- C Witnesses will give frank and complete answers to all questions.

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- C Witnesses will avoid volunteering personal opinions that reflect positions inconsistent with the President's program or appropriation request.
- C If statutory provisions exist for the direct submission of the agency budget request to Congress, OMB may provide you additional materials supporting the President's budget request that you will forward to Congress with the agency testimony. Witnesses will be prepared to explain the agency submission, the request in the President's budget, and any justification material.
- C When responding to specific questions on program and appropriations requests, witnesses will not provide the agency request to OMB or plans for the use of appropriations that exceed the President's request. Typically, witnesses are responsible for one or a few programs, whereas the President is responsible for all the needs of the Federal Government given the revenues available. Where appropriate, witnesses should explain this difference in perspective and that it is therefore not appropriate for them to support appropriations above the President's request.
- C When asked to provide a written response that involves a statement of opinion on program and appropriations requests, witnesses will provide a reply through the agency head.
 - Do not let your communications be perceived as an "appropriations estimate or request ... or an increase in that estimate or request" (31 U.S.C. 1108). You are expected to support the President's budgetary decisions and seek adjustments to those decisions only through established procedures if your agency head determines such action is necessary.

36.3 Clearance of materials for Congress and the media.

Policy consistency between the President's budget and the budget-related materials prepared for Congress and the media is essential. To ensure this consistency, you are required to submit budget-related materials to OMB for clearance prior to transmittal to congressional committees or individual Members of Congress or their staff. Unless a specific exemption is approved by OMB, materials subject to OMB clearance include:

- C All budget justifications and budget-related oversight materials;
- C Testimony before and letters to congressional committees;
- C Written responses to congressional inquiries or other materials for record;
- C Materials responding to committee and subcommittee reporting requirements;
- C Capability statements;
- C Appeals letters;
- C Reprogramming requests;
- C Related cost information;

- C Financial management documents addressing budget and policy issues (e.g., some accountability reports or transmittal documents for audited financial statements); and

- C Proposed press releases relating to the President's budget.

Provide this information to OMB five working days in advance to allow adequate review time. OMB review of reprogramming requests may take longer in some circumstances (e.g., if the request has not been coordinated or if supporting materials have not been provided concurrently). In exceptional circumstances where the response time is very short, agencies may request oral clearance or make other arrangements for expedited review. Immediately after the budget transmittal and after subsequent transmittals, provide OMB with a schedule of anticipated congressional reviews that require agency oral and written participation. Revise this schedule as appropriate.

Address any questions you have about this subsection to the OMB representatives who you normally consult on budget-related matters.

36.4 Clearance of changes to the President's budget.

If you want to propose changes to the President's budget (e.g., appropriations language, limitations, business-type statements required by the Government Corporation Control Act, and dollar amounts), you must follow the confidentiality and clearance guidance provided in this section and submit a written request as described in section 110. OMB will notify you whether a formal transmittal of the change will be made.

When it is possible to reduce the amount of an appropriations request before action has been taken by the Appropriations Committee of either House, the head of your agency should inform OMB promptly. Before your agency head decides to request restoration of a reduction, the reasons for the reduction, the circumstances under which it was made, and its significance to the President's program should be carefully considered.

36.5 Information available to the public.

Many agency budget documents that are subject to the Freedom of Information Act (FOIA) are exempt from mandatory release pursuant to 5 U.S.C. 552(b)(5). Depending on the nature of the record requested, other FOIA exemptions may apply. When deciding whether to withhold a budget document that is exempt from mandatory release, follow the FOIA memoranda issued by the President and the Attorney General on October 4, 1993, which establish a presumption in favor of disclosure. Whether a document concerns a future, current, or past fiscal year is a significant factor in deciding whether it should be withheld under FOIA Exemption 5; the release of budget or current year information is more likely to harm the budget process than release of previous fiscal year information. Agency heads are responsible for determining the propriety of record releases under FOIA.

Certain agencies headed by a collegial body may be required to hold their meetings open to public observation unless the agency properly determines that the matter to be discussed warrants the closing of those meetings for reasons enumerated in the Government in the Sunshine Act (Public Law 94-409). Some meetings covered by that Act may pertain to budgetary information discussed in this Circular. Although, as with the FOIA, it is not possible to determine merely by the generic category of such information whether such an agency would

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be authorized to close a particular meeting covered by the Government in the Sunshine Act, the premature disclosure of budgetary information may “be likely to significantly frustrate implementation of a proposed agency action” (5 U.S.C. 552b(c)(9)(B)). Furthermore, other exemptions from the open meeting requirements of the Act may apply. Such agencies are responsible for the propriety of determinations that would lead to the disclosure of this budgetary information.