REPORT IN SUPPORT OF RECOMMENDATION 71–4

UNIFORM MINIMUM PROCEDURES FOR AGENCIES ADMINISTERING GRANT PROGRAMS

Stephen Kurzman[6]

Introduction

The Committee on Grant and Benefit Programs has engaged in an extensive and lengthy study of the administration of discretionary grant programs by Federal agencies. Mr. Stephen Kurzman, formerly of Kurzman and Goldfarb, Washington, D.C., but recently named Assistant Secretary for Legislative Affairs of the Department of Health, Education, and Welfare, assisted the Committee as a consultant in the conduct of this study.

The Committee has concluded that:

—Agencies that administer grant programs employ disparate and sometimes inadequate procedures in notifying applicants of available funds, stating policies for award of grants, informing applicants of actions taken on applications, and other matters.

—Adoption of more uniform, minimum procedures would be helpful to the agencies and would assist applicants, who often must deal with a number of different agencies.

The Committee has formulated a number of minimum procedures which, if adopted by agencies administering discretionary grants, would benefit the general public and the agencies themselves. Because the principles are applicable to a large number of agencies and programs, agencies must have some discretion to determine the extent to which each proposal is applicable to a particular grant program. But any departure from these basic, minimum procedures should be accompanied by a clear showing of justification by the agency.

---

[6] Attorney, Washington, D.C., Consultant to Committee on Grant and Benefit Programs.

Grant programs of the Federal Government abound in variety and number. Any attempt to define a "grant program" is hazardous, since claims, benefits, and subsidies share many of the characteristics of grant programs. The proposed recommendation applies to all grant programs which involve the exercise of some discretion in their administration. It is *not* intended to apply to Federal grant-in-aid programs that are wholly mandatory, *i.e.*, dispensed in accordance with a statutory formula without any discretion on the part of the agency.

The Conference recommendation is addressed to all agencies that administer grant programs of this character and is premised on the theory that each such agency has adequate statutory authority to implement the recommendation without further legislation. The recommendation could also be implemented by legislation or, at least in part, by executive order. The most discriminating application of the principles implicit in the recommendation, however, can be made by the agencies themselves. Thus it is contemplated that each affected agency should review and revise its procedures to achieve the objectives of the recommendation to the maximum extent feasible.

By statute the Chairman of the Administrative Conference is charged with the responsibility to encourage agencies to carry out the recommendations of the Conference. Should the Chairman believe it necessary, he should, without further Conference action, consider the advisability of legislation, an Executive Order, or other administrative arrangements for securing compliance as may seem desirable.

1. Public Notice

Agencies should publish a notice in the Federal Register (or in other publications that, in the judgment of the agency, have wider distribution among potential grantees) of the availability of grant funds at the outset of a new grant program, each time additional funds become available, and each time a deadline is established for submission of applications for funds. When an agency elects to publish elsewhere than in the Federal Register, it should publish in the Federal Register a statement specifying the other publication or publications in which it will publish.

1. *Need*

There is presently no single avenue for potential grantees under Federal programs to keep abreast of the availability of grant funds. *The Catalog of Federal Domestic Assistance*, now published in loose-

leaf form by the Office of Economic Opportunity, is the most comprehensive available listing of Federal grant programs, but the Catalog does not attempt to provide current information to grantees on the availability of grant funds or of impending deadlines, except where deadlines have been established on a fixed schedule.[7] Because of the delays in the Congressional enactment of appropriation bills in recent years, granting agencies have been forced increasingly to abandon fixed deadlines for grant applications and potential grantee are accordingly in greater need of more current information about the availability of funds.

At present, agencies use a variety of techniques for informing their potential grantee consituencies. In some cases, even major programs rely strictly upon special interest groups to spread the information. The result is haphazard coverage depending upon membership in associations or retention of grant counselors or attorneys who can provide current information through constant personal contact with the granting agencies. Agencies occasionally use news releases or newsletters, sent to the press or to those who happen to be on the agencies' mailing lists. Such information is often reprinted in professional or trade association journals, but the availability of these documents generally requires membership in the association. The journals may or may not carry timely information, and the information republished is seldom comprehensive. For example, notices of new air-pollution-control grant programs are generally published in the monthly magazines of the National League of Cities/U.S. Conference of Mayors and of the Air Pollution Control Association. Nevertheless, air pollution control officials state that occasionally, particularly after a change in local political administration, a small town or county will complain that it did not know about the existence of a program or of the availability of particular funds. Where the grantee constituency consists of even larger numbers of private institutions or individuals, the need for some uniform and unified technique for ascertaining the availability of grant monies, and the deadlines for applying for them, is even more acute than in the case of relatively more sophisticated, and less numerous, public bodies.

2. *Analogies*

Contracting and licensing laws and regulations require that general announcements be made of the availability of proposed contracts and

[7] S. 718, 92nd Congress, First Session, would require publication of the catalog, transmission of it to the Congress annually, and revision on a quarterly basis.

licenses so that potential applicants may be informed. For example, regulations issued under the Public Contracts Act, 41 U.S.C. §§ 251–60, require that where competitive bidding is required, proposed procurements "be publicized [in order] to increase competition." 41 C.F.R. § 1–1.1001. The Secretary of Commerce is empowered to obtain notice of certain proposed procurement actions from any Federal agency and to publish such notices in the Department of Commerce Synopsis. 41 C.F.R. § 1–1.1003–1. Agencies are required to maintain a reasonable number of copies of each invitation for bids and request for proposals published in the Department of Commerce Synopsis and to provide them for perusal by interested businesses, trade associations and others who disseminate such information. 41 C.F.R. § 1–1.1002.

Similarly, licensing agencies may not grant a licensing application until the public has been notified of the pending applications. For example, under the Atomic Energy Act, no license for a utilization or production facility for the generation of commercial power may be issued until the Commission "has published notice of such application once each week for four consecutive weeks in the Federal Register and until four weeks after the last notice." 42 U.S.C. § 2232(c). The Federal Communications Commission may not grant a license for the operation of a radio station "earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof." 47 U.S.C. § 309(b).

3. *Agency Reactions*

Of thirteen agencies canvassed in writing on the original version of this proposal, five accepted the proposal in principle. Of the agencies objecting to the proposal, two stated that the Federal Register is not read by their grant constituencies. These comments apparently overlooked the parenthetical phrase in the proposal which authorizes publication in documents which the agency decides has wider distribution among its potential grantees than the Federal Register. Most of those who objected stated that existing methods of publication were adequate but gave no further reasons. Some indicated that such information was already available "on request" but did not deal with the problem presented to potential grantees who may have to thread through dozens of different agencies in order to obtain the information they seek.

2. Development of Criteria by Rulemaking

Unless otherwise provided by statute, agencies should issue regulations, pursuant to the notice and opportunity to comment provisions of the Administrative Procedure Act (5 U.S.C. § 553), specifying: (a) the procedures to be followed by applicants, and (b) criteria or standards, and priorities among criteria or standards, for the selection of grantees under each grant program. Agencies should review and, when appropriate reissue such regulations at least once every five years.

1. *Need*

Agencies now vary widely in their practices concerning the development of criteria and standards applicable to grant programs. In many, but by no means all, instances, agencies provide some procedural guidance to potential applicants in the form of pamphlets, brochures, guidelines, or, occasionally, regulations. In a smaller number of cases, agencies provide some guidance to potential applicants with regard to the criteria or standards the agencies will use in the selection of grantees under some, if not all, of the provisions of law they administer. As in the case of procedural rules, the form in which standards or criteria are published also varies widely. Apparently, even where publication is made in the form of regulations, agencies do not always treat the regulations as covered by the Administrative Procedure Act and publication prior to effectiveness and an opportunity for comment are not generally provided.[8]

The Social and Rehabilitation Service of HEW may be typical. SRS administers approximately 64 grant programs in the areas of public welfare, social work and vocational rehabilitation, some 34 of which are characterized internally as "project grant programs." In 25 of these 34 project grant programs, regulations have been issued. Yet in eight of these instances, the regulations list only some factors or criteria, not all; in five instances they provide neither factors nor

[8] Recommendation No. 16 of the Administrative Conference of the United States would repeal the statutory exemption of grants from 5 U.S.C. § 553, thereby requiring publication and opportunity for comment when rulemaking regulations are issued regarding grants. Recommendation 16 would not, however, require the issuance of such regulations. Nor would it answer the fundamental question, which is discussed in detail hereafter with regard to Proposal 5, pp. 14–17, about the applicability of the A.P.A. to grants in the first instance, apart from the § 553 exemption language.

493-361 O - 73 - 13

criteria but only examples of acceptable projects; and in only five cases do the regulations establish priorities among the listed factors or criteria. In most cases the regulations are quite unspecific, and in some instances merely refer to other policy determinations of the agency which may or may not be published. In another area of substantial grant-making, education, regulations have been promulgated, both as to substance and procedure, in most programs but not in all. In only one case, that of the Higher Education Facilities Act, does the authorizing statute itself require promulgation of regulations. 20 U.S.C. § 717(a), (b).

However, even where educational grant regulations have been issued, the APA pre-effectiveness publications-and-comments procedure has not been followed. Instead, the HEW internal manual of procedure informally requires, except for good cause, submission of proposed regulations affecting State and local programs to the Advisory Commission on Intergovernmental Relations for comment. Another informal comment process is sometimes followed in the case of fellowship regulations, which may be circulated in draft form among universities and education groups.

It should be noted that the Freedom of Information Act, 5 U.S.C. § 552, may have a bearing on the need for this proposal. With regard to procedural regulations, subsection (a)(1) of the Act would appear to require each agency to specify (1) the way in which the public may go about obtaining information, make submittals or requests, or obtain decisions; (2) statements about its general methods and procedures; (3) rules of procedure and descriptions of forms available; and (4) substantive rules of general applicability and statements of general policy. Subsection (a)(I)(C) of the Act appears to imply that agencies must adopt "rules of procedure"; however, the subsection does not state that the rules must be adopted either in the form of regulations or pursuant to the rulemaking procedures of the A.P.A. (5 U.S.C. § 553). With regard to procedural rules, therefore, the proposal appears to go beyond existing law by providing an opportunity to potential applicants and others who might be affected by the agency's procedural rules, to participate in the rulemaking as provided for by section 553. With regard to substantive regulations, the Freedom of Information Act (5 U.S.C. § 552(a)(I)(D) refers to "substantive rules of general applicability" but includes only those rules "adopted as authorized by law." In this case, some other law requiring the adoption of substantive rules appears to be necessary and the proposal would satisfy this requirement.

2. *Analogy*

Regulations issued under the Public Contracts Act require that invitations for competitive bids include the criteria which will be used to select the successful bidder, as well as the procedures to be followed by bidders. "Special technical qualifications" required of bidders must be spelled out. 41 C.F.R. § 1–2.201(16). Time of delivery or performance must be specified in the invitation, as well as whether alternative bids may be submitted by a single bidder. 41 C.F.R. § 1–201(8), (10).

3. *Agency Reactions*

Of 13 agencies canvassed in writing, four accepted the original proposal in principle and one gave no opinion. Of those which objected to the proposal, most stated that the procedure would be too time-consuming and that criteria or standards for grant-making are too subjective to be incorporated in regulations. On the other hand, other agencies objected because regulations were already required by their authorizing statute or, in one case, by the Freedom of Information Act. One agency, which objected in writing, subsequently reflected acceptance of the proposal in principle during in-depth interviews; in two such subsequent interviews, strengthening amendments were suggested.

3. Avoidance of Conflict of Interest

Unless otherwise provided by statute, non-Federal personnel utilized by granting agencies in the process of selecting grantees from among applicants should be disqualified from participating in regard to applications by organizations with whom they are connected or individuals to whom they are related, and in regard to grant applications of their own that are competing for the same funds.

1. *Need*

Many grant programs, particularly those which follow the model of the research grant programs administered by the National Institutes of Health, use advisory councils or committees as screening groups at one or another stage of the selection process. Private sector personnel utilized as members of these advisory councils or committees are usually academic specialists in a discipline related to the grant

subject. In some instances they are treated as consultants to the granting agency and compensated on a per diem basis; in other instances they are not compensated for their time but are reimbursed only for travel and other out-of-pocket expenses; in a few instances they are not compensated or reimbursed in any way.

The applicability to such council or committee members of existing conflict-of-interest legislation (18 U.S.C. §§ 201 *et seq.*) is unclear, as is the reach of existing law if it is applicable. Section 202 defines as a "special Government employee" an

> "officer or employee of the executive branch of the United States Government. . . ., who is retained, designated, appointed, or employed to perform with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. . . ."

Section 203 prohibits special Government employees from directly or indirectly receiving any compensation for any services rendered

> "in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency . . ."

Section 208 prohibits a special Government employee from participating "personally and substantially" in any matter in which, to his knowledge, he, his spouse, minor child or partner has a financial interest, or in which "an organization" with which he is connected or is seeking employment has a financial interest. Section 208(b) permits the agency to grant an ad hoc exemption if the outside financial interest in a matter is deemed not substantial enough "to affect the integrity" of his services. The sole sanction for violation of sections 203 and 208 is criminal prosecution.

Executive Order No. 11222, 30 F.R. 6469, issued on May 8, 1965, also imposes requirements upon a "consultant, adviser, or other special Government employee" to avoid "private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties." (Part III). The Executive Order requires the filing of a statement of financial interests and of all other employment on the part of each consultant, adviser, or other special Government employee. The Executive Order does not specifically require, as do section 208 and the proposal, disqualification of a special Government employee from acting on any matter in which he or his institution may have an interest, direct or indirect. Neither the statute nor the Executive Order specifically mentions grant activities in any respect, although both contain general terms which might be deemed to include grants within their coverage. HEW conflict of interest regulations (45 C.F.R. §§ 73.735–1101 *et seq.*) are similarly

unclear with respect to members of advisory committees or councils which screen grant applications. However, the HEW regulations are more specific with regard to the remedies available if the financial statement should reveal a potential conflict of interest: "disqualification for a particular assignment" is specifically provided for. 45 C.F.R. § 73.735–1102(a)(2). HUD conflict of interest regulations contain similar provisions. 24 C.F.R. § 0.735–411.

There appears to be no uniformity among agencies in their treatment of advisory committee or council members under existing law and regulations. In the case of air pollution control, for example, research grant review committee members are treated as consultants when they attend review committee meetings and are paid $75.00 per day and expenses during such meetings; but they receive no compensation for the often extensive time required prior to such meetings in reviewing applications. As paid consultants, the review committee members might well be considered "special Government employees" under the law and Executive Order. However, many review committee members are said to be principal investigators under air pollution control grants. It is unclear whether the agency believes that the existing law and regulations are inapplicable to review committee members or whether, even if they are applicable, the existing provisions prohibit the members from advising on programs for which they have themselves submitted grant applications.

In view of these uncertainties, clarification would be desirable on two points: first, that conflict of interest statutes, the Executive Order and regulations do apply to private sector personnel who serve on committees or councils on grant applications; and second, that members of such councils or committees should be disqualified from participating in regard to applications by organizations with whom they are connected or individuals to whom they are related, and in regard to grant applications of their own that are competing for the same funds.

2. *Analogy*

HEW regulations already appear to recognize the potential for conflict of interest where a special Government employee is himself a grantee or potential grantee. While the HEW regulations provide that a special Government employee, other than a consultant, need not submit a statement of financial interests, the regulations also provide that such an employee may be required to submit the statement in particular cases. As an example, the regulations state that a special Government employee may be required by the Department to submit a financial interest statement if:

> "The performance of his Department duties could directly and predictably affect a person or organization that is known to: Have a grant from this Department or contract with it; be seeking or negotiating such grant or contract; . . . ."

45 C.F.R. 73.735–1206(a)(1). Another category of special Government employees who may be required to submit financial statements, according to the HEW regulations, includes

> "those whose principal non-Government occupation is: On or concerned with work for the Government or supported in whole or in part by the Government under grant or contract; . . ." 45 C.F.R. 73.735–1206(a)(2).

4. *Agency Reactions*

Of thirteen agencies canvassed in writing, nine accepted the original proposal in principle, two reported that it was inapplicable to their programs and one gave no opinion. The only agency which opposed the proposal flatly stated:

> Advisors are chosen for excellence and expertise in a particular area, the same criteria used to award grants. The proposed limitations on the availability of non-Federal personnel would either prevent many needed applicants from receiving assistance or would discourage the valuable contribution these individuals presently make in their advisory capacity. It would be unfortunate to deny the Government the service of individuals of excellence in one capacity so as to have it in another.
>
> "Granting agencies already provide, under conflict of interest standards, that an advisor not participate in consideration of their applications, applications of relatives or applications of their own institutions."

Clearly the policy reflected in the last sentence is consistent with the proposal here advanced.

Another agency which found the proposal acceptable, suggested that the word "projects" be substituted for the word "programs" in order to avoid disqualifying for research grants many of the "most valued members of the (agency's) review panels."

4. Notification of Applicants

Agencies should notify applicants in writing of the award, rejection, modification, non-renewal or termination of grants, or the disallowance of expenditures under grants, specifying the grounds for such action. A more detailed statement of reasons should be made available upon request by the applicant.

1. *Need*

Not all agencies notify applicants in writing of the actions taken on their applications. Instances have been reported, for example, in

which applicants have been forced to inquire about pending applications and would otherwise have no knowledge of the fact that their applications have been denied or have been put in an inactive status. More commonly, however, the rejected applicant is advised in writing, but the notification is little more than a conclusory statement that his application has been rejected after consideration of all applications and in view of budgetary limitations. For example, in the case of air pollution control grants, applicants are advised of rejected research grant applications only by a statement that their proposed research grant did not receive recommendations for approval from the national advisory council and that decisions "represent value judgments of a very difficult nature." In some instances, a research applicant is advised that the council recommended approval, but insufficient funds exist to "assure payment" and the applicant will be notified if it is "determined that award can be made." Air pollution control personnel indicate that only occasionally will a rejected applicant reply asking for greater specificity; eighty to ninety percent of those rejected do not inquire further. In the area of HEW education grants, notification is generally given to rejected applicants but the reasons given are usually vague, often merely that the project did not indicate as much relative promise as those projects which were funded. In general, current practice appears to be to provide greater information on rejections to project grant applicants, which are usually institutions, than to research grant applicants, who are usually individuals. In current practice, apparently, reasons for making grant awards are rarely given. The result, in general, is that rejected applicants generally have little or no basis for determining whether the agency rationally applied its authorizing statute and its other standards or criteria to his case, or to the cases of competing applicants who were successful.

2. *Analogies*

Under the Administrative Procedure Act, 5 U.S.C. § 557(c), in instances of formal rulemaking and adjudications, all decisions must include

> "a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial therof."

In matters covered by that section, in other words, the parties, the public, and the courts are entitled to know the rational nexus between

the agency's action and its underlying authority to act. See *Baltimore and Ohio Company* v. *Aberdeen and Rockfish Railroad Company*, 393 U.S. 87 (1968), *rehearing denied*, 393 U.S. 1124. A similar requirement appears to be in the process of development by the courts in the case of public contracts. See *Scanwell Laboratories, Inc.* v. *Thomas*, 424 F. 2d 859 (D.C. Cir. 1970).

3. *Agency Reactions*

Of thirteen agencies canvassed in writing on the proposal, two gave no opinion and nine accepted the proposal in principle. Five agencies indicated that they follow this practice at present. However, one of the five indicated that articulation of reasons for rejection would often be embarrassing to granting agencies. Another indicated that giving reasons for rejections would be unnecessarily burdensome to the agency. On the other hand, still another of the five stated that grantees who receive an award do not need to be specifically informed of the reasons for the award. One respondent indicated that most agencies already provide applicants with notification of their action but expressed reservations on the proposal if all agencies were required to provide explanations, particularly on rejections. Its grounds for this position were "the threat of much time-consuming labor" and "decisions of advisors and agency heads would be subject to considerable question, objection and dissatisfaction." This agency indicated further that most of its sub-agencies provide reasons for rejections only on specific request. As stated above, agencies appear willing to reveal reasons for award, rejection, etc., of project grant applications but are often unwilling to do so in the case of research applications, except upon specific request and, even then, not in all instances. This distinction appears to be based on several factors: the much larger volume of individual research applications as compared with project grant applications (some 30,000 research grant applications per year to the National Institutes of Health alone); the desire to protect academicians who serve on advisory councils from criticism of their comments on particular applications; and the desire to protect individuals from exposure of adverse opinions on their applications.

The recommendation would accommodate these difficulties by providing that only the *grounds* for the action need be stated (which could be done on a check list) and that greater detail would be furnished only on request.

5. Public Information

Unless otherwise provided by statute and subject to the exemptions contained in the Freedom of Information Act, 5 U.S.C. § 552(b), agencies should maintain and make available to public inspection the notifications specified in paragraph 4.

1. *Need*

There is presently considerable doubt as to the coverage of grant documents by the Freedom of Information Act, and agency practice varies widely. The statute provides:

> "Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> Unless the materials are promptly published and copies offered for sale." 5 U.S.C. § 552(a)(2).

Grant applications, advisory council evaluations, staff evaluations, documents notifying applicants of award, rejection, etc., protests by applicants to the agency as a result of agency action, do not appear to fall clearly within any of subsections (A), (B), or (C) of this provision. The closest category appears to be subsection (a), at least with regard to agency notifications of award, rejection, etc., but this would require interpretation of "adjudication of cases" so as to include grant decision-making. Yet the terms "adjudication" and "cases" would appear to be terms of art not obviously applicable to grant decision-making. "Adjudication" is defined in the A.P.A. as an "agency process for the formulation of an order." 5 U.S.C. § 551(7). And "order" is defined in turn as

> "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

Even if the award, rejection, etc., of a grant may be considered to be the "formulation of an order" so defined, the additional phrase "of cases" in section 552(b) would appear to narrow the coverage further so as to exclude grant-making.

The Attorney General's Memorandum interpreting the Act mentions grants in only one sentence and that sentence indirectly suggests that grants are not covered by section 552(a)(2). In a paragraph dealing with the necessity to publish general descriptions of internal management functions under section 552(a)(1) of the Act, the Memorandum states as an aside:

> "Of course, functions such as adjudication, licensing, rulemaking, and loan, grant and benefit functions are within the publication requirements of (section 552(a)(1)(B) except as they are exempted under subsection (b)." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, p. 8.

This sentence appears to have the effect of including grants under the first part of the Act, subsection (a)(1), but excluding grants from the second part, subsection (a)(2). The inference is strengthened by the distinction between "adjudication," which is stated separately from "grant and benefit functions." As noted above, "adjudication of cases" is the operative phrase in subsection (a)(2).

As is demonstrated below in the agency reactions, the result has apparently been considerable confusion within agencies as to the applicability of the Act to various types of documents involved in the grant process and considerable variation in handling such matters. Initial litigation under the Act does not appear to have reached the question of grants as yet. Under the circumstances, it would appear highly desirable to clarify the applicability to grants of the principle of disclosure embodied in the Act, subject to the specific exemptions already set out in Section 552(b) of the Act.

Under the exemptions of this section, which the proposal incorporates by reference, a number of documents, or parts of documents, related to the award, rejection, modification, etc., of grant applications would be protected from disclosure. For example, grant applications often include disclosures which might be considered trade secrets and commercial or financial information which is privileged or confidential. If, as is commonly the case, an agency notification of award incorporated the grant application by reference, disclosure of the notification would be prohibited under the exemption except to the extent that the documents could be scrubbed of the trade secret or confidential information. Current litigation indicates that the courts will require disclosure under the Freedom of Information Act of those parts of documents which do not contain exempted material. See *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970). Similarly, advisory committee and staff evaluations of grant proposals would probably be protected from disclosure, at least in part, under the inter-agency or intra-agency memorandum exemption.

Again, current litigation indicates that the courts will construe this exemption narrowly, exempting documents which were part of the agency's "deliberative process" but not those which set forth the factual basis or findings upon which the agency based its decision. *Consumers Union of United States, Inc.* v. *Veterans Administration*, 301 F. Supp. 796, 805 (S.D.N.Y. 1969).

2. *Analogy*

Regulations issued under the Public Contracts Act require that notice be given to unsuccessful bidders, along with the reasons for rejection, in general terms, whenever the contracting officer has reason to believe that the bidder may protest the award. The agency must also furnish to unsuccessful bidders and interested third parties the name and address of the successful bidder, the contract price, and the location of an abstract of the bids, which must be available for inspection by unsuccessful bidders as wells as by interested third parties. 41 C.F.R. § 1–2.408.

3. *Agency Reactions*

Of thirteen agencies canvassed in writing on the original proposal, one gave no opinion, and seven accepted the proposal in principle. The agency which gave no opinion and three of those which accepted the proposal commented that the information would already have to be disclosed under the Freedom of Information Act, or would probably have to be disclosed under that Act. Of the five agencies which objected to the proposal, one referred to its own statute, which specifically prohibits disclosure of confidential information such as that relating to salaries. 18 U.S.C. § 1905. This objection would appear to be met by the language of the proposal "unless otherwise provided by statute." Two other agencies which objected to the proposal relied upon the Freedom of Information Act as prohibiting such disclosures. Another agency stated that its files are now available under the Freedom of Information Act but saw the proposal as amending existing legislation to require "that consultants' evaluations of proposals be made available to the public." As discussed above, the second sentence of the proposal, which imports all the exemptions currently in force under the Freedom of Information Act, would appear to meet this objection. Another respondent objected to the proposal on the ground that under its current regulations, where a grant application has been approved and a grant awarded:

> "the application and the awarding document are available for disclosure unless a research grant is involved. For the latter case, 45 C.F.R. 5.74 precludes disclosure unless the grant research has been performed and a final report has been submitted."

This agency further stated that both rejected and accepted applicants should be protected against disclosure of "their ideas and such things as trade secrets." Again, the second sentence of the proposal should meet this objection.