

(b) Except for authorized medicinal purposes, the introduction, possession, use, sale, or other transfer of marijuana, narcotic substances or other controlled substances on board any ship, craft, or aircraft of the Department of the Navy or within any naval station or other place under the jurisdiction of the Department of the Navy, or the possession, use, sale, or other transfer of marijuana, narcotic substances or other controlled substances by persons in the naval service, is prohibited.

(c) The term *controlled substance* means: a drug or other substance included in Schedule I, II, III, IV, or V established by section 202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1236), as updated and republished under the provisions of that Act.

§§ 700.1152–700.1160 [Reserved]

§ 700.1161 Endorsement of commercial product or process.

Except as necessary during contract administration to determine specification or other compliance, no person in the Department of the Navy, in his official capacity, shall endorse or express an opinion of approval or disapproval of any commercial product or process.

Subpart K—Purpose and Force of Regulations within the Department of the Navy

§ 700.1201 Purpose and force of United States Navy Regulations.

United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions, and relationships of various commands, officials, and individuals. Other regulations, instructions, orders, manuals, or similar publications, shall not be issued within the Department of the Navy which conflict with, alter or amend any provision of Navy Regulations.

§ 700.1202 Issuances concerning matters over which control is exercised.

Responsible officers and officials of the Department of the Navy may issue, or cause to be issued, orders, instructions, directives, manuals or similar publications concerning matters over which they exercise command, control, or supervision.

PART 701—AVAILABILITY OF DEPARTMENT OF THE NAVY RECORDS AND PUBLICATION OF DEPARTMENT OF THE NAVY DOCUMENTS AFFECTING THE PUBLIC

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AUTHORITY: 5 U.S.C. 552.

EDITORIAL NOTE: For nomenclature changes for this part see 59 FR 29721, June 9, 1994.

Subpart A—Department of the Navy Freedom of Information Act Program

SOURCE: 56 FR 66574, Dec. 24, 1991, unless otherwise noted.

§ 701.1 Purpose.

Subparts A, B, C, and D of this part implement the Freedom of Information Act (5 U.S.C. 552), and the Department of Defense Directives 5400.7 and 5400.7-R series¹, Department of Defense Freedom of Information Act Program, (See 32 CFR part 286) and promote uniformity in the Department of the Navy Freedom of Information Act (FOIA) Program. It is written to provide guidance to members of the public on how and where to submit FOIA requests and appeals within the Department of the Navy.

§ 701.2 Applicability.

Subparts A, B, C, and D of this part apply throughout the Department of the Navy. It governs disclosure of agency records to “any person,” which means that any individual, to include foreign citizens, partnerships, corporations, associations and foreign, state, or local governments, may use the FOIA to obtain information. The exception to that policy is that it does not apply to Federal agencies or to fugitives from justice.

(a) *Requests from state or local government officials.* Requests from state or local government officials for naval records are treated the same as any other requester.

(b) *Requests from foreign governments.* Requests from foreign governments for naval records are treated the same as any other requester. However, requests from foreign governments that do not

¹ Copies may be obtained if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(c) *Privileged release to U.S. Government officials.* Naval records may be authenticated and released to U.S. Government officials if they are requesting them on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial. For example:

(1) To a committee or subcommittee of Congress, or to either House sitting as a whole.

(NOTE: Requests from Members of Congress who are not seeking records on behalf of a Congressional Committee, Subcommittee, or either House sitting as a whole, but on behalf of their constituents, are treated the same as any other requester).

(2) To the Federal courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

(3) To other Federal agencies, both executive and administrative, as determined by the head of a naval activity or designee.

In those instances, naval activities shall mark the records as "Privileged" and "Exempt from Public Disclosure." Any special handling instructions shall also be annotated on the records. Because such releases are not made under the provisions of the FOIA, they do not impact on future decisions to release/deny requests for the same records to other requesters.

(d) *Publication and public availability of special classes of records.* The requirements of 5 U.S.C. 552 that certain classes of Department of the Navy regulatory, rulemaking, and organizational records must be published in the FEDERAL REGISTER for the guidance of the public and made available for public inspection and copying are implemented in 32 CFR part 701, subpart C.

(e) *Public affairs regulations.* Subparts A, B, C, and D of this part are intended to complement, not restrict, the conduct of Department of the Navy public affairs, media relations, community relations and internal relations functions and practices authorized in Secretary of the Navy Instruction 5720.44 series, "Department of the Navy Public Affairs Regulations." Should the practices authorized in that instruction

conflict in any respect, the provisions of these subparts shall be controlling.

(f) *U.S. Navy Regulations.* Release of a record to a member of the public under FOIA shall be deemed to have occurred in the discharge of official duties (Article 1120, U.S. Navy Regulations (1990)). Process a request by a member of the public under the instructions outlined in Section 3 of Chapter 11, U.S. Navy Regulations.

(g) *Other directives.* The following directives, and other directives and instructions cited in part 701, to the extent they do not conflict, provide additional information relating to subparts A, B, C, and D of this part. Should the practices authorized in the directives conflict in any respect, the provisions of these subparts shall be controlling.

(1) Marine Corps Manual, paragraph 1015 (NOTAL); Marine Corps Order P5720.56, Availability to the Public of Marine Corps Records (NOTAL); and for Headquarters, U.S. Marine Corps, HQO P5000.12, Chapter 10 (NOTAL) and HQO 5720.9 (NOTAL).

(2) Federal Personnel Manual, chapters 293, 294, 297, 335, 339, and 713 (NOTAL)—release of information from active and inactive civilian personnel records.

(3) Manual of the Medical Department, U.S. Navy (NAV MED P-117), Chapters 23-70 through 23-79 (NOTAL) release of information from active and inactive medical records.

(4) JAGINST 5800.7C, Manual of the Judge Advocate General (JAGMAN), Chapter V (NOTAL).

(h) *Relationship between FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For those reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts.

(1) Requesters who seek records about themselves contained in a PA system of records and who cite or imply PA, will have their requests processed under the provisions of PA (see subpart F of this part).

(2) Requesters who seek records about themselves which are not contained in a PA system of records and who cite or imply PA, will have their requests processed under FOIA provisions, since they have no access under PA.

(3) Requesters who seek records about themselves which are contained in a PA system of records and who cite or imply FOIA or both Acts will have their requests processed under the time limits of FOIA and the exemptions and fees of PA. That is appropriate since greater access will be received under PA.

(4) Requesters who seek access to agency records and who cite or imply PA and FOIA, will have their requests processed under FOIA.

(5) Requesters who seek access to agency records and who cite or imply FOIA, will have their requests processed under FOIA.

If the requester has failed to cite the appropriate Act, naval activities shall apprise the requester in the final response under which Act his/her request was processed.

§ 701.3 Definitions.

(a) *FOIA request.* A written request for Department of the Navy records, made by "any person," including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes 5 U.S.C. 552, Department of Defense Directives 5400.7 and 5400.7-R series, "Department of Defense Freedom of Information Act Program" (see 32 CFR part 286) and/or subparts A, B, C, and D of this part.

(b) *Agency record.* (1) The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and in Department of the Navy's possession and control at the time a FOIA request is made.

(2) The following are not included in this definition:

(i) Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, and parts of wrecked aircraft and ships, whatever their historical value, or value as evidence.

(ii) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a naval activity. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium are not agency records (that does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software). Exceptions to this position are outlined in § 701.3(b)(3).

(iii) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(iv) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(v) Information stored within a computer for which there is no existing computer program for retrieval of the requested information.

(3) In some instances, computer software may have to be treated as an agency record and processed under the FOIA. Such situations are rare and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an agency record are:

(i) When the data is embedded within the software and cannot be extracted without the software. In that situation, both the data and the software must be reviewed for release or denial under FOIA.

(ii) Where the software itself reveals information about organizations, policies, functions, decisions, or procedures of a naval activity, such as computer models used to forecast budget outlays, calculate retirement system costs, or optimization models or travel costs.

Review exemptions (b)(4) and (b)(5) at § 701.26 and § 701.27 of subpart B of this part for guidance on release determinations of computer software.

(4) A record must exist and be in the possession and control of the Department of the Navy at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

(5) If unaltered publications and processed documents, such as regulations, manuals, maps, and related geophysical materials are available to the public through an established distribution system with or without charge, the provisions of 5 U.S.C. 552(a)(3) normally do not apply and they need not be processed under the FOIA. Normally, documents disclosed to the public by publication in the FEDERAL REGISTER also require no processing under the FOIA. In such cases, naval activities should direct the requester to the appropriate source to obtain the record.

(c) *Release authority.* Release authorities are commanding officers and heads of Navy and Marine Corps shore activities or their designee that are authorized to furnish copies of records under their cognizance for which no FOIA exemption applies.

(d) *Initial Denial Authority (IDA).* An official who has been granted authority to withhold records under FOIA, either in whole or in part, based on the FOIA exemptions. IDAs may also grant or deny requests for reduction or waiver of fees. See § 701.5 for a list of IDAs.

(e) *Appellate authority.* The Secretary of the Navy (SECNAV) has delegated his appellate authority to the Navy Judge Advocate General (NJAG) and the General Counsel (OGC) to rule on administrative appeals of denials of FOIA requests for information under their cognizance, as outlined in § 701.10.

(f) *Administrative appeal.* A request by a member of the general public, made under FOIA, asking the appellate authority to reverse the IDA's decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees. A requester may also file an administrative appeal for non-response to a FOIA request within the statutory time limits or for a "no

record" response if he/she believes an adequate search was not conducted.

(g) *Public interest.* Public interest is official information that sheds light on a naval activity's performance of its statutory duties because it falls within the statutory purpose of FOIA in informing citizens about what their government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files that reveals little or nothing about an agency's or official's own conduct.

(h) *Electronic data.* Electronic data are those records and information which are created, stored, and retrieved by electronic means. This does not include computer software, which is the tool by which to create, store, or retrieve electronic data.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29721, June 9, 1994]

§ 701.4 Policy.

It is Department of the Navy policy to make its records available to requesters in accordance with FOIA. When requested, Navy and Marine Corps activities shall assist requesters in complying with the administrative requirements necessary to request materials sought under the Act.

(a) *Openness with the public.* The public has a right to information concerning the activities of its government. Department of the Navy policy is to conduct its activities in an open manner and to provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A Department of the Navy record requested by a member of the public who follows rules established by proper authority shall only be withheld when it is exempt from mandatory public disclosure based on one or more of the nine FOIA exemptions.

(b) *Avoidance of procedural obstacles.* Naval activities shall ensure that procedural matters do not unnecessarily

impede a requester from obtaining Department of the Navy records promptly. Naval activities shall provide assistance to requesters to help them understand and comply with procedures established by this instruction. Fees shall not be used to discourage requesters (see subpart D of this part).

(c) *Prompt action on requests.* When a requester complies with the procedures established in this instruction for obtaining naval records, the request shall receive prompt attention. A reply shall be dispatched within 10 working days, unless a delay is authorized. If a naval activity has a significant number of requests (i.e., 10 or more), the requests shall be processed in order of receipt. This, however, does not preclude a naval activity from acting on a request which can be easily answered, regardless of its ranking within the order of receipt. A naval activity may also expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of the activity processing the request.

(d) *Use of exemptions/discretionary release.* Department of the Navy policy is to make records publicly available, unless they qualify for withholding under one or more of the nine FOIA exemptions (see subpart B of this part for an in-depth review of the exemptions). Naval activities may elect to make a discretionary release. A discretionary release to one requester may, however, preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else. Suggest the following language be included with the discretionary release of any record that could be subject to withholding:

The information you requested is subject to being withheld under section (b) of the Freedom of Information Act. The release of this material to you by the Department of the Navy is discretionary and does not constitute a waiver of our right to claim this exemption for similar records in the future.

Additionally, a discretionary release is generally not appropriate for records exempt from disclosure under exemptions (b)(1)—classified; (b)(3)—exempted by statute; (b)(4)—trade secret/proprietary; (b)(6)—personal privacy; and

(b)(7)(C)—personal information contained in investigatory records which if released would constitute an unwarranted invasion of privacy. Exemptions (b)(4), (b)(6), and (b)(7)(C) cannot be claimed for information which was supplied by the requester of the information.

(e) *Public domain.* Nonexempt records released under this instruction are considered in the public domain. Exempt records released under this instruction or other statutory or regulatory authority may be considered to be in the public domain only when their release constitutes a waiver of a FOIA exemption. When release does not constitute such a waiver, such as disclosure to a properly constituted advisory committee or a Congressional Committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, this instruction applies if the same individual seeks the records in a private or personal capacity.

(f) *Creating a record.* (1) A record must exist and be in the possession and control of the Department of the Navy at the time of the search to be considered subject to FOIA. Mere possession of a record does not presume departmental control; such records, or identifiable portions, should be referred to the originating activity for direct response to the requester. There is no obligation to create or compile a record to satisfy a FOIA request. A naval activity may, however, compile a new record if it is a more useful response to the requester, or less burdensome to the naval activity than providing existing records, and the requester does not object. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. See subpart D of this part for fees.

(2) With respect to electronic data, the issue of whether records are actually or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data

where creation of a record, programming, or particular format are questionable, naval activities should apply a standard of reasonableness (i.e., if the capability exists to respond to a request, and the effort would be a "business as usual" approach, then the request should be processed; however, the request need not be processed when the capability to respond does not exist without a significant expenditure of resources, thus not being a normal "business as usual" approach). In such instances, the requester is advised that no record exists and the FOIA does not require agencies to create or compile a record to satisfy a FOIA request.

(g) *Reasonably segregable information.* FOIA requires that all "reasonably segregable" information must be released when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct the excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

(h) *Special mail services.* Naval activities are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, this use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

(i) *Authentication of records released under FOIA.* In addition to the requirements of FOIA, records provided under FOIA shall be authenticated when necessary to fulfill an official governmental or other legal function. Authentication will be made with an appropriate seal. This service is not included in the FOIA fee schedule and naval activities may charge \$5.20 for each authentication.

§ 701.5 Responsibility and authority.

(a) *Chief of Naval Operations (CNO).* CNO is designated as the official responsible for administering and supervising the execution of 5 U.S.C. 552 and Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act

Program (see 32 CFR part 286). CNO has designated the Assistant Vice Chief of Naval Operations (N09B30) as principal Department of the Navy FOIA Coordinator to:

(1) Set Department of the Navy policy on the provisions of the FOIA.

(2) Serve as principal advisor on all FOIA matters.

(3) Oversee the administration of the FOIA program, which includes preparing the Department of the Navy Annual FOIA Report for submission to Congress.

(4) Develop a Navy-wide FOIA training program and serve as training-over-sight manager.

(5) Conduct staff assistance visits within the Department of the Navy to review compliance with 5 U.S.C. 552 and subparts A, B, C, and D of this part.

(6) Set Department of the Navy policy on the marking, handling, safeguarding and transmission of documents marked "For Official Use Only."

(b) *Commandant of the Marine Corps (CMC).* CMC is responsible for administering and supervising the execution of this instruction within the Marine Corps. The Commandant has designated the Director of Administration and Resource Management (Code AR) as the FOIA Coordinator for Headquarters, U.S. Marine Corps.

(c) *FOIA coordinator.* Each addressee is responsible for implementing and administering a FOIA program under this instruction. Each addressee shall designate a FOIA Coordinator to:

(1) Serve as principal point of contact on FOIA matters.

(2) Provide training for activity/command personnel on the provisions of 5 U.S.C. 552 and subparts A, B, C, and D of this part.

(3) Issue an implementing instruction which designates the activity's FOIA Coordinator and Initial Denial Authority(ies), provides guidance on the marking, handling, and safeguarding of documents marked FOUO, FOIA records disposition, and FOIA processing procedures.

(4) Review internal directives, practices, and procedures, including those for forms and records, for conformity with this instruction, when applicable.

(5) Compile input and submit consolidated Annual FOIA Report to Echelon 2 FOIA Coordinator, who, in turn, will provide consolidated report to CNO (N09B30).

(6) Review activity conformance with the marking, handling, transporting, and safeguarding of FOUO information.

(7) Provide guidance on handling FOIA requests and the scope of the FOIA exemptions.

(8) Review subpart C of this part and provide CNO (N09B30) with updated information, as appropriate.

(9) Conduct staff assistance visits within command and lower echelon commands to ensure compliance with FOIA.

(10) Echelon 2 FOIA Coordinators shall provide CNO (N09B30) with a complete listing of all FOIA Coordinators under their jurisdiction. Such information should include activity name and address, office code, name of FOIA Coordinator, and commercial and autovon telephone numbers.

(d) *Release Authorities.* (1) The role of the release authority is to respond to requests for documents under his/her cognizance for which no FOIA exemption applies. Release authorities are commanding officers and heads of all Navy and Marine Corps activities (departmental and field).

(2) Release authorities are required to coordinate with officials having cognizance over the subject matter of the requested record, if there is a question as to its releasability. However, if it is determined that a requested record requires withholding, in whole or in part, the release authority must refer the documents along with recommendations regarding release to the initial denial authority (IDA) in the chain of command. If geographically isolated, the release authority may forward the request to another IDA, if so authorized by the IDA in the chain of command.

(3) For records which are part of the Navy's Privacy Act (PA) systems of records, the record custodian specified in the systems notice is the appropriate authority to respond to the request.

(e) *Initial Denial Authorities (IDAs).* (1) The IDA role is to deny and grant requests, either in whole or in part, for

documents or records under his or her cognizance; to grant one 10-working day formal extension to the time limit for responding to FOIA requests; and to deny requests to waive or reduce FOIA fees when the information sought relates to matters within their respective geographical areas of responsibility or chain of command.

(2) Within the Department of the Navy, the following chief officials, their respective vice commanders, deputies, and their principal assistants are designated as IDAs.

(i) Department of the Navy: Civilian Executive Assistants; CNO; CMC; Chief of Naval Personnel; Commanders of the Naval Systems Commands, Office of Naval Intelligence, Naval Security Group Command, and Naval Computer and Telecommunications Command; Chief, Bureau of Medicine and Surgery; Auditor General of the Navy; Naval Inspector General; Director, Office of Civilian Personnel Management; Chief of Naval Education and Training; Commander, Naval Reserve Force; Chief of Naval Research; Commander, Naval Meteorology and Oceanography Command; heads of DON Staff Offices, Boards, and Councils; Flag Officers. NJAG and his Deputy, and the OGC and his Deputies, are excluded from this grant of authorization. While the NJAG and OGC are not Initial Denial Authorities, they are authorized to further delegate the authority conferred here to other senior officers/officials within NJAG and OGC.

(ii) Initial Denial Authorities may choose to delegate initial denial authority to those major activities under their control that receive voluminous requests. Such action is discretionary and should be limited.

(iii) For the shore establishment:

(A) All officers authorized under Article 22, Uniform Code of Military Justice (UCMJ), or designated in section 0120, Manual of the Judge Advocate General, to convene general courts-martial.

(B) Director, Naval Criminal Investigative Service and Deputy Commander, Naval Legal Service Command.

(iv) In the Operating Forces: All officers authorized by Article 22, UCMJ, or designated in section 0120, Manual of

the Judge Advocate General (JAGINST 5800.7C), to convene general courts-martial.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29721, June 9, 1994]

§ 701.6 Format and procedures for requesting information under FOIA.

(a) *Minimum requirements.* In an effort to eliminate any unnecessary burdens on members of the public, the Department of the Navy does not require requesters to complete a specific form to file a FOIA request. A request can be written or typed, but at a minimum should:

(1) Be in writing and indicate expressly, or clearly imply, that it is a request under 5 U.S.C. 552, Department of Defense Directives 5400.7 and 5400.7-R, Department of Defense Freedom of Information Act Program (see 32 CFR part 286), or subparts A, B, C, and D of this part. Verbal requests are not honored.

(2) Contain a reasonable description of the particular record(s) requested to enable naval personnel to locate or identify the particular record(s) desired with a reasonable amount of effort.

(3) Contain a clear statement of the requester's willingness to pay all fees or those up to a specified amount if the fees are expected to exceed the minimum fee waiver threshold, or provide satisfactory evidence that he or she is entitled to a waiver or reduction of such fees.

(b) *Identification of addressees.* To expedite processing of requests, requesters should submit written requests directly to the naval activity having cognizance over the records and clearly show all addressees within the Department of the Navy, Department of Defense, or other Federal agency to whom that or a similar request was also sent. That procedure will reduce processing time requirements and ensure better inter and intra-agency coordination. Naval activities are under no obligation to establish procedures to receive hand delivered requests.

(c) *Reasonably describe the record(s) being sought.* Identification of the record being sought is the responsibility of the requester. The requester must provide a description of the docu-

ment that enables the Government to locate the record with a reasonable amount of effort. FOIA does not authorize "fishing expeditions." If a request does not contain a reasonable description, the naval activity shall advise the requester of the defect and when possible assist the requester in reframing the request. Naval activities are not obligated to act on the request until the requester responds with more specificity. When practical, naval activities shall assist the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with FOIA.

(1) The following guidelines are provided for "fishing expedition" requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories—file related and event related. File related includes information on the type of record (e.g., memorandum, letter, etc.), title, index citation, subject area, date the record was created, and originator. Event related includes the circumstances resulting in the record's creation or date and circumstances surrounding the event the record covers.

(2) Generally, a record is reasonably described when the description contains sufficient file related information to permit an organized non-random search of the activity's filing arrangements and existing retrieval systems, or when the record contains sufficient event related information needed to conduct such a search.

(3) The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records retrievable by personal identifiers need be searched. Search for such records may be conducted under PA procedures (see subpart F of this part). No record may be denied that is releasable under FOIA.

(4) The previous guidelines notwithstanding, the decision of a naval activity concerning reasonableness of description must be based on knowledge of its files. If the description enables naval personnel to locate the record with reasonable effort, the description

is adequate. However, if a naval activity receives a request not "reasonably described" it shall notify the requester of the defect and provide guidance on specificity required to begin a search.

(d) *Fees.* (1) Fees may not be used to discourage requesters. If fees are expected to exceed the minimum fee waiver threshold of \$15.00, the requester is required to address fees in the request, i.e., a willingness to pay all fees or those up to a specified amount, or request a waiver/reduction of fees.

(2) To assist naval activities in determining assessable fees, requesters are encouraged to identify the fee category for which they wish to be considered. If the requester believes he/she qualifies for a waiver/reduction of fees, requesters are required to provide specific justification regarding qualification for a waiver so that decision can be rendered. See Subpart D of this Part 701 for further information on fees.

(e) *Treatment of requests which do not meet the minimum requirements.* (1) In those instances when a request does not meet the minimum requirements, naval activities should nonetheless return the requests within 10 working days and advise the requester of how to perfect the request. Naval activities may contact the requester by telephone to refine the request. For example, if a requester has failed to "reasonably describe" the records being sought, he/she may be asked to provide identifying data such as location, timeframe, originator, background information, etc., to enable a search. If the requester has failed to mention fees and fees are applicable, the requester should be provided an estimate of the cost involved in processing the request. When practicable, naval activities are encouraged to contact requesters to clarify what they are seeking.

(2) If a request fails to qualify within this instruction but the requested record is available and releasable in its entirety, the responding official may provide a copy of the record if he or she determines it to be in the best interest of the activity. This provision is within the sole and exclusive discretion of the responsible official of the activity concerned and does not create an excep-

tion to or grounds for waiver of the minimum requirements.

§ 701.7 Procedures for processing FOIA requests.

(a) *Control system.* All requests for records which cite or imply the FOIA must be entered into a formal control system, either manual or computerized, that is designed to track the request from receipt to response. Information contained in the tracking system should at a minimum include the name of the requester, the date of the request, the date the request was received, suspense date, and the date the response was made. This will ensure that the requester is apprised of the status of his/her request within 10 working days and will provide required information should the requester challenge the processing of his/her request.

(1) *Receipt controls.* At a minimum, date stamp the request upon receipt, establish a suspense control record and follow-up procedures, and conspicuously stamp or label the request "FREEDOM OF INFORMATION ACT REQUEST" to indicate priority handling throughout processing. Naval activities are encouraged to assign a FOIA Case Number for each request and to apprise the requester of the number assigned. This number is an effective tool for tracking, filing, and retrieving the request.

(2) *Forwarding controls.* As a rule, requests forwarded to another activity for action should have the letter of referral and envelope conspicuously stamped or labeled "FREEDOM OF INFORMATION ACT REQUEST" and a record shall be kept of the request, and the date and activity to which it was forwarded.

(b) *Time limits.* Once a request has been received by a naval activity having cognizance over the requested record(s), that activity has 10 working days (excluding Saturdays, Sundays, and legal holidays) to issue a letter which advises the requester of the action to be taken on the request (i.e., documents are denied; documents are released; documents will be released within a specific timeframe). If a naval activity is unable to comply with the request within the 10 working day timeframe, then a formal or informal

time extension must be pursued and a letter forwarded to the requester advising of the extension.

(1) A formal time extension letter is issued in those instances where an activity requires up to an additional 10 working days to respond to a request because of the need to:

(i) *Search*. The need to search for and collect records located in whole or part at places separate from the activity processing the request;

(ii) *Examine*. The need to search for, collect, and examine a substantial number of records responsive to a request; or,

(iii) *Consult*. The need to consult with another naval activity or federal agency with a substantial interest in the determination of the request.

(2) A formal time extension response must be issued by the IDA within 10 working days of receipt of the request, describe the circumstance(s) for the delay, and indicate the anticipated date for a substantive response.

(3) In those instances where it appears the request might be ultimately denied, in whole or in part, the appellate authority (i.e., NJAG or OGC) may be consulted by expeditious means prior to authorizing a formal extension.

(4) In those instances when it is anticipated the normal statutory time limits (including the statutory time extension) are insufficient to provide a response, the IDA shall acknowledge the request in writing prior to the expiration of the normal statutory time limits (including the statutory time extension), describe the circumstance(s) requiring the delay and indicate the anticipated date for the substantive response. The requester shall be advised that an appeal may be made to the cognizant appellate authority within 60 calendar days or await a substantive determination by a specified date. It shall be made clear that such an agreement does not prejudice the right of the requester to appeal an adverse substantive determination.

(5) In those unusual cases where the statutory time limits cannot be met and no informal extension has been agreed to, the inability to process any part of the request within the specified

time should be explained to the requester, with notification that the delay may be treated as an initial denial with a right to appeal, or that the requester may agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. Further, naval activities should be advised that the requester still retains the right to treat this delay as a defacto denial with full administrative remedies.

(6) Informal extension of time limits—a recommended alternative is to negotiate an informal extension of time with the requester. The advantages include the ability to agree on a mutually acceptable date to respond that exceeds 10 working days, and the letter of confirmation does not require the signature of an IDA. Additionally, it does not impact on the additional days the appellate authority may take when responding to an appeal.

(c) *Decision to release records*. Release authorities may release records under their cognizance which do not qualify for denial under FOIA exemptions. Such responses should be made within the applicable time limits of FOIA and should be processed as follows:

(1) If the requested records are releasable in their entirety, release authorities should forward the records to the requester and advise of any applicable fees.

(2) If the requested records are releasable in their entirety but not yet available, the release authority should notify the requester the request has been approved and the requested records will be forwarded by a specified date.

(3) If the request for examination of records is approved, notify the requester of the time and place.

(d) *Processing documents originated by/created for another activity*. (1) If an official receives a request for records that he or she holds, but which were originated by another naval activity, the official shall normally coordinate with that activity prior to referring the FOIA request and copies of the requested documents to the originator for direct response. The naval activity that initially received the request is responsible for notifying the requester

of the referral. The originating naval activity shall not release or deny such records without prior consultation with the referring naval activity.

(2) If an official receives a request for records that he or she holds, but were created for another naval activity or government agency, the official shall refer the FOIA request and copies of the requested documents to that activity/agency for direct response, after coordination and concurrence. The activity/agency may have an equally valid interest in withholding the record as the naval activity that created it. In such referrals, the naval activity should provide a recommendation concerning release with the referral. The naval activity that initially received the request is responsible for notifying the requester of the referral.

(e) *Processing misdirected requests.* Requesters are not always aware of the correct activity to address a FOIA request.

(1) A request received by a naval activity having no records responsive to the request shall only be referred to another naval activity if the activity contacts the naval activity and confirms its cognizance over the requested information. When a member of the public complies with the procedures established in this instruction for obtaining records, the request shall receive prompt attention and a reply dispatched within 10 working days, unless a delay is authorized. Each naval activity is responsible for developing procedures to ensure the expeditious handling, prompt retrieval, and review of requested records. The 10 working day time limit commences upon receipt of the request by the cognizant activity.

(2) If the cognizant official is unable to respond to the requester within the statutory time limit, he or she may seek a formal or informal extension of time.

(3) If a naval activity has a significant number of requests (e.g., 10 or more), the requests generally will be processed in order of receipt. But a naval activity may commence action on an easily answered request, regardless of its ranking within the order of receipt.

(f) *Decision to deny records in whole or in part.* To deny a requested record that

is in the possession and control of the Department of the Navy, it must be determined that the record is included in one or more of the nine categories of records exempt from mandatory disclosure as provided by the FOIA and addressed at subpart B of this part.

(1) Because release authorities cannot deny information, they must forward responsive documents along with their release determination to an IDA for consideration and response to the requester. In those instances, the release authority will apprise the requester that his/her request and responsive documents were referred to the activity having cognizance over the documents for a release determination and direct response to the requester. The referral to an IDA shall include a copy of the request, documents responsive to the request, recommendation on partial/total denial, and supporting rationale for the exemption(s) claimed.

(2) When an IDA receives a referral from a subordinate activity recommending a FOIA request be denied in whole or in part, or receives a FOIA request for documents under his/her cognizance, the IDA shall take one of the following actions within 10 working days:

(i) Deny or release the requested information. If an IDA determines the record contains information which is not releasable under FOIA, and any releasable information contained in the record is not reasonably segregable from the non-releasable information, notify the requester of the exemption(s) claimed and provide procedures to be followed should the requester decide to appeal the determination to appellate authority.

(ii) If unable to respond within the applicable time limits, explain the reason(s) for the delay to the requester, with notification that he or she may treat this delay as an initial denial with a right to submit an administrative appeal to the cognizant appellate authority, or that the requester may agree to await a substantive determination by a specified date. It shall be made clear that any such agreement does not prejudice the right of the requester to appeal an adverse substantive determination.

(iii) If an IDA determines that the requester's claimed entitlement to waiver/reduction of fees is not warranted, IDAs shall notify the requester of such determination, provide the reason(s) for the denial, and advise the requester of the right to appeal the determination to the cognizant appellate authority within 60 calendar days. If the requester appeals the denial to waive/reduce fees, the release of the records may be withheld until the fee is paid or the appellate authority grants a waiver/reduction of fees.

(3) IDAs are responsible for maintaining copies of initial denials in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation.

(g) *Excising documents*—(1) *Classified documents*. Since FOIA requires that all reasonably segregable portions of documents be released to the requester, there will be instances when portions of documents which contain classified markings are subject to release. In these instances, naval activities shall cross through the classified markings that appear at the top and bottom of the document and cross through any classified paragraph markings that are being released. This practice is necessary to eliminate any appearance that a "classified" document was released.

(2) *Unclassified documents*. Naval activities are encouraged to "blank out" and bracket the denied information and annotate the exemption(s) claimed. This practice will permit the requester to easily identify information being withheld and the basis for withholding.

(h) *"Other Reasons" for not releasing a record*. Besides denying a records in whole or in part, there are six "other reasons" for not releasing a record. In most instances, these "other reason" responses do not constitute a denial of information and therefore do not require the signature of an IDA. They are:

(1) *Transferred request*. Requester advised that his/her request and/or requested documents have been transferred to another naval activity or federal agency having cognizance over the requested information for action and direct response.

(2) *Lack of records*. Requester advised that a search of files held by the naval activity has resulted in a failure to locate any responsive records. Such response now requires that a requester be advised of his/her right to appeal the adequacy of the search to the cognizant appellate authority. The response does not normally require the signature of an IDA.

(3) *Failure of requester to reasonably describe records being sought*. Requester advised that his/her request requires specificity with regard to description of the records being sought to enable the naval activity to conduct a reasonable search. Such responses generally apprise the requester of the kind of specificity required.

(4) *Other failures by requester to comply with published rules and/or directives*. Requester advised that he/she has failed to comply with established rules/directives, such as failure to agree to pay fees, and therefore the request is being returned for refinement.

(5) *Withdrawal*. Requester contacted the naval activity by telephone or letter and advised he/she wishes to cancel the request or appeal.

(6) *Not an agency record*. Requester advised the information/records he/she seeks is not an agency record as defined by §701.3 of Subpart A.

(i) *Consultation/coordination*. The Department of the Navy processes thousands of FOIA requests annually. Because there is no central repository for records and no central release/denial authority, proposed responses shall be properly coordinated and appropriate officials consulted prior to a response being made to the requester. Specifically:

(1) Naval activities and federal agencies with a substantial interest in the subject matter of the requested records should be consulted prior to release or denial of information.

(2) Public affairs officers or the Chief of Information (CHINFO) should be consulted when a FOIA request is received from a news media representative, the records requested are considered newsworthy, or a denial of a request is expected to be publicly challenged. CHINFO should be promptly notified of any release having evident public affairs implications and a copy

of the request and response should be provided.

(3) The appropriate JAG attorney or field counsel should be consulted on the interpretation and application of this instruction where a denial of a request is expected to be judicially challenged.

(j) *Response to the requester.* (1) Initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 10 working days after receipt of the request by the official designated to respond. When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(2) When a decision is made to release a record, a copy should be made available promptly to the requester once he or she has complied with preliminary procedural requirements.

(3) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the IDA's name, rank, and title, shall cite the specific exemption(s) that apply in sufficient detail, and provide the requester with the name and address of the appellate authority, should the requester desire to file an appeal. When claiming exemption "(b)(1)," IDAs shall to the extent reasonably feasible, provide the requester with a summary of the applicable criteria for classification. Additionally, the marking "For Official Use Only" on a requested document does not constitute a basis for denial. Rather, it alerts the reviewer that the document may contain information which is protectible under exemptions (b)(2) through (b)(9). It is up to the reviewing official to advise the requester of the applicable exemptions and to release all "reasonably segregable" information.

(k) *Fees.* The final response to the requester should contain information on the fee status of the request. Generally, information shall reflect one or more of the following conditions:

(1) "The fees for processing your request total \$. Please forward your check or money order made payable to the Treasurer of the United States to this office within 30 days." Subpart D

of this part addresses when fees may be collected in advance of forwarding the documents.

(2) All fees have been received.

(3) Fees have been waived because they fall below the automatic fee waiver threshold.

(4) A request for waiver/reduction of fees has been denied.

(5) Fees have been waived or reduced from a specified amount to another specified amount because the rationale provided in support of a request for waiver has been accepted.

(6) Fees due in a specified amount have not been received (see subpart D of this part for specific information on FOIA fees and fee rates for technical data).

§ 701.8 Records requiring special handling.

The following actions shall be taken on requests for:

(a) *Classified records.* (1) If a naval activity receives a request for information whose existence or nonexistence is itself classifiable under Executive Order 12356, 50 U.S.C. 401, the naval activity shall refuse to confirm or deny the existence or nonexistence of the requested information.

(2) If a naval activity receives a request for documents in its custody that were classified by another agency, or which contains information classified by another agency, it shall refer the request and copies of the requested documents to the originating agency for processing, and may, after consultation with the originating agency inform the requester of the referral. Referred records shall be identified consistent with security requirements. In cases where the originating agency determines they can neither confirm nor deny the existence or nonexistence of the requested information, the referring agency shall deny the request.

(3) If a naval activity receives a request for classified records or information originated by another naval activity, for which the head of the activity is not the classifying authority under OPNAV Instruction 5520.1 series, "Department of the Navy Information and

Personnel Security Program Regulation," the request, copies of the requested documents, and a recommendation concerning release (if appropriate) shall promptly be readdressed and forwarded to the official having classification authority for the subject matter. That official will make a release determination concerning the classified information and notify the requester, or the activity originally receiving the request, in 10 working days of that determination. The naval activity that initially received the request has responsibility for notifying the requester of the referral. Referred records shall only be identified to the extent consistent with security requirements.

(b) *Naval Investigative Service (NIS)/Naval Criminal Investigative Service (NCIS) reports.* The Director, Naval Criminal Investigative Service, is the release/denial authority for all NIS/NCIS reports. Accordingly, a request for a NIS/NCIS report shall be promptly readdressed to NCIS and the requester notified of the referral. Direct liaison with NCIS prior to the referral is encouraged.

(c) *Naval Inspector General reports.* (1) The Naval Inspector General (NAVINSGEN) is the release/denial authority for all investigations and inspections conducted by or at the direction of NAVINSGEN and for any records held by any command that relate to Navy hotline complaints that have been referred to the NAVINSGEN. Accordingly, such requests shall be promptly readdressed and forwarded to NAVINSGEN and the requester notified of the referral. Requests for local command Inspector General reports which have not been referred to the NAVINSGEN may be released by the local command.

(2) The Deputy Naval Inspector General for Marine Corps Matters (DNIGMC) is the release authority for all investigations conducted by the DNIGMC. Requests for local Marine Corps command Inspector General reports shall be coordinated with the DNIGMC.

(d) *Manual of the Judge Advocate General (JAGMAN) investigative reports and courts-martial records.* NJAG is the release/denial authority for all JAGMAN investigative reports and courts-mar-

tial records. Requests for JAGMAN investigative reports and courts-martial records shall be promptly readdressed and forwarded to NJAG and the requester notified of the referral.

(e) *Mishap Investigation Reports (MIRs).* The Commander, Naval Safety Center (COMNAVSAFECEN) is the release/denial authority for all requests for mishap investigation reports. Requests for mishap investigation reports shall be promptly readdressed and forwarded to COMNAVSAFECEN and the requester notified of the referral.

(f) *Naval Audit Service reports.* The Auditor General of the Navy is the release/denial authority for all Naval Audit Service reports. Requests for audit reports shall be promptly readdressed and forwarded to the Auditor General and the requester notified of the referral.

(g) *Technical documents controlled by distribution statements.* A request for a technical document to which "Distribution Statement B, C, D, E, F, or X" (see OPNAVINST 5510.1 series) is affixed shall be promptly readdressed and forwarded to the "controlling DOD office" for review and release determination. The naval activity that initially received the request is responsible for notifying the requester of the referral. Direct liaison with the cognizant official prior to referral is encouraged.

(h) *Records originated by other government agencies.* When a request for records originated by an agency outside the Department of the Navy is received, promptly readdress and forward the request along with copies of the requested documents to the cognizant agency and notify the requester of the referral. That may be accomplished by sending a copy of the referral letter, less attachments, to the requester. The 10 working day time limit begins when the request is received by the cognizant agency. If additional guidance is required, contact CNO (N09B30) or CMC (ARAD), as appropriate. Direct liaison with the cognizant agency is encouraged to ensure expeditious handling of the request.

(i) *National Security Council (NSC)/White House Documents.* The Director, NSC is the release/denial authority for NSC documents or White House files. Requesters seeking NSC or White

House documents should be notified to write directly to the NSC or White House for such documents. Department of the Navy documents in which NSC or the White House has a concurrent reviewing interest shall be forwarded to the Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), ATTN: Directorate for Freedom of Information and Security Review (DFOISR), which shall effect coordination with the NSC or White House, and return the documents to the originating activity after review and a release determination is made. NSC or White House documents discovered in a naval activity's files which are responsive to a FOIA request shall be forwarded to the Director, Freedom of Information and Security Review, OASD(PA), for subsequent coordination with the NSC or White House and returned to the naval activity for a release determination. Additionally, in such instances an information copy should be provided to CNO (N09B30).

(j) *Naval Telecommunications Procedures (NTP) publications.* The Commander, Naval Computer and Telecommunications Command (COMNAVCOMTELCOM) is the release/denial authority for NTP publications. Requests for NTP publications shall be promptly readdressed and forwarded to COMNAVCOMTELCOM and the requester notified of the referral. Direct liaison with COMNAVCOMTELCOM prior to referral is encouraged.

(k) *Naval Nuclear Propulsion Information (NNPI).* The Director, Naval Nuclear Propulsion Program (N00N/NAVSEA 08) is the release/denial authority for all information concerning NNPI. Naval activities receiving such requests are responsible for searching their files for responsive records. If no documents are located, the naval activity should respond to the requester and provide N00N with a copy of the request and response. If documents are located, the request, responsive records, and a recommendation regarding release should be promptly readdressed to the CNO (N00N/NAVSEA 08), who will ensure proper coordination and review.

(l) *Medical quality assurance documents.* The Chief, Bureau of Medicine and Surgery (BUMED) is the release/de-

nial authority for all naval medical quality assurance documents as defined by Title 10, United States Code, Section 1102. Requests for medical quality assurance shall be promptly readdressed and forwarded to BUMED and the requester notified of the referral.

(m) *Records of a non-U.S. Government source.* (1) When a request is received for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as provided by a non-U.S. Government source, the source of the record or information (known as "the submitter" for proprietary data under FOIA exemption (b)(4)) shall be promptly notified of the request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning release, unless it is clear that there can be no valid basis for objection. That practice is required for FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4). If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under FOIA. When a substantial issue has been raised, the naval activity may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on legal and substantive issues prior to making an agency determination. When the source advises he or she will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

(2) The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the Department of the Navy from multinational organizations, such as the North Atlantic Treaty Organization (NATO) and North American Air Defense (NORAD), or foreign governments. Coordination with foreign governments will be made through the Department of State.

(n) *Government Accounting Office (GAO) documents.* On occasion, the Department of the Navy receives FOIA requests for GAO documents containing Department of the Navy information, either directly from requesters, or as referrals from the GAO. Since the GAO is outside the Executive Branch and therefore not subject to FOIA, all FOIA requests for GAO documents containing Department of the Navy information will be processed by the Department of the Navy. In those instances when a requester seeks a copy of an unclassified GAO report, naval activities may apprise the requester of its availability from the Director, GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877-1450 under their cash sales program.

(o) *Mailing lists.* Frequent FOIA requests are received for mailing lists of the home addresses and/or duty station addresses of naval personnel.

(1) A list of home addresses is not releasable without the individuals' consent because it is a clearly unwarranted invasion of the individuals' personal privacy, and therefore, may be withheld from disclosure under 5 U.S.C. 552(b)(6), see subpart B of this part.

(2) Unclassified information about service members may be withheld when disclosure "would constitute a clearly unwarranted invasion of personal privacy" under FOIA (exemption (b)(6) applies). Disclosure of lists of names and duty addresses or duty telephone numbers of members assigned to units that are stationed in foreign territories, routinely deployable, or sensitive, constitutes a clearly unwarranted invasion of personal privacy. Disclosure of such information poses a security threat to those service members because it reveals information about their degree of involvement in military actions in support of national policy, the type of

naval unit to which they are attached, and their presence or absence from their households. Release of such information aids the targeting of service members and their families by terrorists or other persons opposed to implementation of national policy. Only an extraordinary public interest in disclosure of this information can outweigh the need and responsibility of the Navy to protect the tranquility and safety of service members and their families who repeatedly have been subjected to harassment, threats, and physical injury. Units covered by this policy are:

(i) Those units located outside the 50 states, District of Columbia, Commonwealth of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa.

(ii) Routinely deployable units. Those units that normally deploy from homeport or permanent station on a periodic or rotating basis to meet operational requirements or participate in scheduled exercises. This includes routinely deployable ships, aviation squadrons, operational staffs, and all units of the Fleet Marine Force (FMF). Routinely deployable units do not include ships undergoing extensive yard work or whose primary mission is support of training, e.g., yard craft and auxiliary aircraft landing training ships.

(iii) Units engaged in sensitive operations. Those units primarily involved in training for or conduct of covert, clandestine, or classified missions, including units primarily involved in collecting, handling, disposing, or storing of classified information and materials. This also includes units engaged in training or advising foreign personnel. Examples of units covered by this exemption are nuclear power training facilities, SEAL Teams, Security Group Commands, Weapons Stations, and Communication Stations.

(3) Except as otherwise provided, lists containing names and duty addresses of DOD personnel, both military and civilian, who are assigned to units in the Continental United States (CONUS) and U.S. territories shall be released regardless of who has initiated the request.

(4) Exceptions to this policy must be coordinated with the CNO (N09B30) or

CMC (ARAD) prior to responding to requests, including those from Members of Congress. The foregoing policy should be considered when weighing the releasability of the address or phone number of a specifically named individual.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29721, June 9, 1994]

§ 701.9 For Official Use Only (FOUO).

FOUO is a marking which is placed on documents to alert the holder that they contain information that may be withheld under exemptions (b)(2) through (b)(9) of the FOIA. Because FOUO is not a security classification, exemption (b)(1) does not apply.

(a) *Prior FOUO application.* The prior application of FOUO is not a conclusive basis for withholding a record requested under FOIA. When such a record is requested, it shall be evaluated to determine whether FOIA exemptions apply in withholding all or portions of the record. Information which is reasonably segregable and does not fall under a FOIA exemption(s) must be released to the requester.

(b) *Historical papers.* Records such as notes, working papers, and drafts retained as historical evidence of Department of the Navy actions have no special status apart from FOIA exemptions.

(c) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

(d) *Distribution statement.* Information in a technical document that requires a distribution statement under OPNAVINST 5510.1 series, "Department of the Navy Information and Personnel Security Program Regulation," shall bear that statement and may be marked FOUO, as appropriate.

(e) *Location of markings.* (1) An unclassified document that contains FOUO information shall have FOR OFFICIAL USE ONLY typed, stamped, or

printed in capital letters centered at the bottom on the outside of the front cover (if any), on each page containing FOUO information, and on the outside of the back cover (if any).

(2) An unclassified directive that contains FOUO information shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the bottom on the outside of the front cover (if any), on each page of the directive top and bottom, and on the outside of the back cover (if any).

(3) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(4) Within a classified or unclassified document, an individual page that contains FOUO information, but does not contain classified information, shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the top and bottom edge of the page.

(5) Other records, such as photographs, films, cassette tapes, movies, or slides, shall be marked FOR OFFICIAL USE ONLY so that a recipient or viewer knows the status of the information.

(6) Unclassified automatic data processing (ADP) media with FOUO information shall be marked as follows:

(i) An unclassified deck of punched or aperture cards with FOUO information shall be marked as a single document with FOR OFFICIAL USE ONLY marked on the face of the first and last card, and on the top of the deck.

(ii) An unclassified magnetic tape, cassette, or disk pack that contains FOUO information shall have FOR OFFICIAL USE ONLY marked externally on a removable label. The resulting hard copy report or computer printout shall reflect the FOR OFFICIAL USE ONLY marking on the top and bottom of each page. It may be accomplished by using a programmable header or marking the hard copy manually.

(7) FOUO material transmitted outside the Department of the Navy requires an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on

the record prior to transfer: "This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s)...apply(ies)."

(f) *Release and transmission procedures.* Until FOUO status is terminated, the following release and transmission instructions apply:

(1) FOUO information may be disseminated within Department of the Navy activities and between officials of the Department of the Navy and contractors and grantees who conduct official business for the Department of the Navy or Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(2) Department of the Navy holders of FOUO information may convey such information to officials in other departments or agencies of the executive and judicial branches to fulfill a governmental function, subject to any limitations contained in the Privacy Act (PA) (see Subpart F of this Part 701), pertaining to disclosure of personal information from PA record systems. When transmitting these records, ensure they are marked FOR OFFICIAL USE ONLY, and the recipient is advised the information has been exempt from public disclosure under FOIA and that special handling instructions do or do not apply. For purposes of disclosing records, Department of Defense is the "agency."

(3) Records released to Congress or the GAO should be reviewed to see if the information warrants FOUO status. If not, prior FOUO markings shall be removed. If the withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect it against public disclosure for reasons that are explained.

(4) Each part of electronically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall con-

tain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted per communications security procedures in ACP-121 (United States Supplement 1, "Communication Instructions") for FOUO information.

(g) *Transporting FOUO information.* Records which contain FOUO information shall be transported in a manner that precludes disclosure of contents. If not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments that otherwise qualify under postal regulations may be sent fourth-class mail.

(h) *Safeguarding FOUO information.* (1) During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-governmental personnel.

(2) At the close of business, FOUO records shall be stored to preclude unauthorized access. Filing such material with other unclassified records in unlocked files, desks, or similar containers is adequate when U.S. Government or government contractor internal building security is provided during non-duty hours. When internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles, such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of the PA (see Subpart F of this Part 701) shall meet the safeguards for that group of records as outlined in the PA systems notice.

(3) Guidance for safeguarding media marked FOUO and processed by an ADP system, activity, or network is addressed in OPNAVINST 5239.1 series, "Department of the Navy Automatic Data Processing Security Program."

(i) *Termination.* The originator or other competent authority, such as an IDA or appellate authority, will terminate FOUO markings or status when the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified as practical. Upon notification, holders shall remove

the FOUO markings. Records in file or storage need not be retrieved solely for that purpose.

(j) *Disposal.* (1) Non-record copies of FOUO material (including hard copy reports and computer printouts) may be destroyed by tearing each copy into pieces to preclude reconstructing, and disposed in regular trash containers. When local circumstances or experience indicates that this destruction method is insufficient, local authorities may direct other methods while considering the additional expense balanced against the sensitivity of FOUO information in the records. FOUO information on unclassified magnetic storage media shall be disposed of by overwriting the media one time with any one character. Storage areas within an ADP system (internal memory, buffers, registers, and similar storage areas) may be cleared by using a hardware clear switch, a power-on reset cycle, or a program designated to overwrite the storage area.

(2) Record copies of FOUO documents shall be disposed of following the disposal standards established under SECNAVINST 5212.5C (Records Disposal Manual) for the particular kind of record.

(k) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of Department of the Navy information classified for security purposes. However, appropriate administrative or disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the PA may result in civil and criminal sanctions against responsible person(s). The naval activity that originated the FOUO information shall be informed of its unauthorized disclosure.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29722, June 9, 1994]

§ 701.10 FOIA appeals/judicial actions.

(a) *How to file an appeal.* The following guidelines should be followed by individuals wishing to appeal a denial of information, a request for waiver/reduction of fees, or a “no record” response:

(1) The appeal must be received by the cognizant appellate authority (i.e.,

NJAG or OGC) within 60 days of the date of the response.

(2) The appeal letter must be in writing and requesters should provide a copy of the IDA’s response when filing a written appeal to the Navy’s appellate authorities (OGC or NJAG, depending on subject matter), regarding an IDA’s decision that a record is exempt in whole or in part or because a naval activity denied a request for a waiver/reduction of fees. The requester should include a copy of the denial letter and provide supporting rationale on why the appeal should be granted. The requester may appeal a “no records” response if he/she believes an adequate search of files was not conducted.

(b) *Time of receipt.* The time limits for responding to a FOIA appeal commence when the appeal reaches the office of the appellate authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Appellate authorities—(1) Responsibility and authority.* NJAG and OGC are authorized to adjudicate appeals made to the Secretary of the Navy (SECNAV) on denials of requests for copies of Department of the Navy records or portions thereof, or refusals to waive or reduce fees on matters within their respective areas of cognizance. That includes the authority to release or withhold records, or portions thereof, waive or reduce fees, and to act as required by SECNAV for appeals under 5 U.S.C. 552 and subparts A, B, C, and D of this part. NJAG and OGC are further authorized to delegate this authority to a designated Assistant NJAG and the Principal Deputy OGC or Deputy General Counsel (Logistics), respectively, under such terms and conditions as they may deem appropriate.

(2) Respective areas of cognizance. As delineated in SECNAV Instructions 5430.25D and 5430.27A (NOTAL), the respective areas of cognizance of NJAG and OGC for providing legal services for the Department of the Navy are:

(i) NJAG. In addition to military law, all matters except those falling under the cognizance of OGC.

(ii) OGC. Business and commercial law aspects of:

(A) Acquisition, custody, management, transportation, taxation, and

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disposition of real and personal property and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contracts, and matters relating to the naval petroleum reserves;

(B) Operations of the Military Sealift Command, excepting tort and admiralty claims arising independently of contracts;

(C) Office of the Comptroller of the Navy;

(D) Naval Computer and Telecommunications Command;

(E) Patents, inventions, trademarks, copyrights, royalty payments, and similar matters;

(F) Procurement of foreign military sales, co-production and cooperative research and development and related agreements, NATO standardization agreements, and matters relating to the Arms Exports Control Act;

(G) Department of the Navy litigation before the Armed Services Board of Contract Appeals; and,

(H) Civilian personnel law matters on employing present and former Navy civilian employees; and

(I) Environmental matters.

(d) *Addresses for appeals.* Appeals should be addressed to the cognizant appellate authority. The addresses of the SECNAV's designees are:

(1) Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(2) General Counsel of the Navy, 2211 Jefferson Davis Highway, Arlington, VA 22244-5103.

(e) *Time limits for filing FOIA appeals.*

(1) The requester should file the appeal so it reaches the appellate authority not later than 60 calendar days from the date of the initial denial letter. At the end of 60 calendar days, the case may be considered closed; however, the requester may file litigation for denial of the appeal. If the requester was provided several incremental determinations for a single request, the time limit for filing the appeal begins when the requester receives the last response. Records which are denied shall be retained for a period of six years to meet the statute of limitations of claims requirement.

(2) Final determinations on appeals shall normally be made within 20 working days after receipt.

(f) *Delay in responding to a FOIA appeal.* If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request. If a determination cannot be made and the requester is notified within 20 working days, the appellate authority shall acknowledge to the requester in writing the date of receipt of the appeal, circumstances for the delay, and anticipated date for substantive response. Requesters may be advised that if the delay exceeds the statutory extension or is for reasons other than "unusual circumstances," they may consider their administrative remedies exhausted. Further, requesters should be advised that they may wait for a substantive response without prejudicing their right to judicial remedy. The appellate authority shall continue to process the case expeditiously whether or not the requester seeks a court order for release of the record(s). A copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

(g) *Action upon receipt.* Upon receipt of a FOIA appeal, NJAG or OGC shall inform the cognizant IDA of receipt of the appeal. The appellate authority will seek documentation from the IDA from which to make a determination. Normally, the IDA will be requested to forward a copy of the initial request, a copy of the response, a copy of excised and unexcised documents, and supporting rationale for continued withholding (if applicable) to the appellate authority within 10 working days.

(h) *Consultation/coordination.* (1) The Assistant for Naval Investigative Matters and Security (OP-09N) may be consulted to resolve inconsistencies or disputes involving classified records.

(2) Direct liaison with appropriate officials within the Department of the Navy and other interested federal agencies is authorized at the discretion of the appellate authority, who also coordinates with appropriate Department

of Defense officials and Justice as prescribed by directives of the Secretary of Defense (SECDEF).

(3) SECNAV or appropriate Civilian Executive Assistants shall be consulted and kept advised of cases with unusual implications. CHINFO shall be consulted and kept advised on cases having public affairs implications.

(i) *Response to the requester.* (1) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the records released should be promptly forwarded to the requester after compliance with any procedural requirements, such as payment of fees.

(2) Final denial to provide a requested record or to approve a request to waive or reduce fees must be made in writing by the appellate authority. The response shall include the following:

(i) An explanation of the basis for the denial including the applicable statutory exemption(s) invoked.

(ii) If the final denial is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, is based on a declassification review, and the review confirmed the continuing validity of the security classification.

(iii) The response shall advise the requester that the material denied does not contain reasonably segregable portions.

(iv) The response shall advise the requester of the right to judicial review.

(v) The final denial shall include the name and title of the official responsible for the denial.

(vi) An information copy, less attachments, should be provided to CNO (N09B30).

(j) *Judicial actions.* A requester may seek an order from a U.S. District Court to compel release of a record after exhaustion of administrative remedies, i.e., the IDA or appellate authority denied release or when a naval activity failed to respond within the prescribed time limits.

(1) *Burden of proof.* The naval activity has the burden of proof to justify its refusal to provide a record. The court

evaluates the case de novo (anew) and may examine any requested record in camera (in private) to determine whether the denial was justified.

(2) *Actions by the court.* (i) When a naval activity fails to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, the court may retain jurisdiction and allow the naval activity additional time to complete its review of the records.

(ii) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(iii) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether civilian personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board will conduct an investigation to determine whether or not disciplinary action is warranted. The naval activity is obligated to take the action recommended by the special counsel.

(iv) When a naval activity fails to comply with the court order to produce records that have been withheld improperly, the court may punish the responsible official for contempt.

(3) *Non-United States Government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. The source shall be notified promptly of the court action. If the source advises that it is seeking court action to prevent release, the naval activity shall defer answering or otherwise pleading to the complaint as long as permitted by the Court or until a decision is rendered in the court action initiated by the source, whichever is sooner.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29722, June 9, 1994]

§ 701.11 Publication, indexing, and public inspection of certain classes of records.

Secretary of the Navy Instruction 5720.45², "Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and other Documents Affecting the Public," assigns the heads of Department of the Navy components, Commanders of the Naval Systems Commands, and the Military Sealift Command responsibilities for executing the following additional requirements on records under their respective cognizance:

(a) Publication of certain classes of Department of the Navy organizational, regulatory, policy, procedural, interpretative, and substantive records on a current basis in the FEDERAL REGISTER, for the guidance of the public.

(b) Maintenance of current indexes of various classes of records which are precedential for decisions affecting members of the public, and publication of such indexes at least quarterly or making them available to the public by other authorized means.

(c) Making the above records and indexes regularly available for public inspection and copying at naval locations.

(b) Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all "reasonably segregable" information be provided to the requester, unless the segregated information would have no meaning. In other words, redaction is not required when it would reduce the balance of the text to "unintelligible gibberish."

(c) The decision to withhold information in whole or in part based on one or more of the FOIA exemptions requires the signature of an Initial Denial Authority (IDA). See paragraph (e) of § 701.5 for a listing of IDAs.

(d) The following types of records may be withheld in whole or in part from public disclosure under FOIA, unless otherwise prescribed by law. A discretionary release to one requester may preclude the withholding of the same records under a FOIA exemption if the record is subsequently requested by someone else. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.

Subpart B—FOIA Exemption Guidelines

SOURCE: 56 FR 66586, Dec. 24, 1991, unless otherwise noted.

EDITORIAL NOTE: At 56 FR 66586, 66590, Dec. 24, 1991, §§ 701.21-701.32 (subparts B and C) were revised. Section 701.31 appears at both subpart B and subpart C.

§ 701.21 General.

(a) The FOIA is a disclosure statute whose goal is an informed citizenry. Because of this records are considered to be releasable unless they contain information that qualifies for withholding under one or more of the nine FOIA exemptions. The exemptions are identified as 5 U.S.C. 552 number (b)(1) through (b)(9).

² Copies may be obtained if needed, from the Commanding Officer, U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

§ 701.22 Exemption (b)(1).

Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under criteria established by Executive Order (i.e., Executive Order 12356) and implemented by regulations. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in OPNAVINST 5510.1H, "Department of the Navy Information and Personnel Security Program Regulation" apply. In addition, this exemption shall be invoked when the following situations are apparent:

(a) The fact of the existence or non-existence of a record would itself reveal classified information. In that situation, naval activities shall neither confirm nor deny the existence or non-existence of the record being requested. A "refusal to neither confirm nor

deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no record” response when a record does not exist, and a “refusal to neither confirm nor deny” when a record does exist will itself disclose national security information. That kind of response is referred to as a “Glomar” denial.

(b) Information that concerns one or more of the classification categories established by Executive order and OPNAVINST 5510.1 series, “Department of the Navy Information and Personnel Security Program Regulation,” shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

§ 701.23 Procedures for processing classified documents.

(a) The threshold for claiming exemption (b)(1) is that the document is properly and currently classified. Because of that, naval activities should normally refer requests for classified documents to the activity that originally classified the information. If the referring activity has an interest in the matter, they should also provide the receiving activity with a release determination. The receiving activity will then conduct a declassification review and apprise the requester of their determination, i.e., documents are properly and currently classified and therefore must be denied; portions of the documents are releasable; etc. Only an official authorized under § 701.5 to deny requests and who has cognizance over the classified matters in the records, may deny records. Such denial must be based on an approved security classification guide issued under OPNAVINST 5510.1 series or OPNAVINST 5513 series; resource document originated by another naval activity or government agency; an original classification determination with written justification for classification, and the justification remains valid; or, not readily identifiable, but classification is believed warranted because of classification criteria in OPNAVINST 5510.1 series, “Department of the Navy

Information and Personnel Security Program.”

(b) Material that is not classified at the time of the FOIA request may undergo a classification review to determine whether the information should be classified (ensure strict compliance with the provisions of OPNAVINST 5510.1 series regarding classification of information after receipt of a FOIA request).

(c) Executive Order 12356 provides that “information shall be classified as long as required by national security considerations, and time frame no longer triggers automatic declassification.”

(d) If the original classifier of a record receives a request for the record and upon review determines that there is no basis for continued classification, either in whole or part, the record or portions of it should be declassified. The document also undergoes another review to determine whether any other FOIA exemptions apply to the declassified information.

(e) In some instances, the compilation of unclassified information may result in the classification of the record as a whole. This is called the “mosaic” approach—the concept that apparently harmless pieces of information, when assembled together could reveal a damaging picture.

§ 701.24 Exemption (b)(2).

Those related solely to the internal personnel rules and practices of an agency. This exemption has two profiles, high (b)(2) and low (b)(2).

(a) Records qualifying under high (b)(2) are those containing or constituting statutes, rules, orders, manuals, directives, and instructions the release of which would allow circumvention of the records thereby substantially hindering the effective performance of a significant function of the Department of the Navy. Examples include:

(1) Those operating rules, guidelines, and manuals for Department of the Navy investigators, inspectors, auditors, or examiners that must remain privileged in order for the naval activity to fulfill a legal requirement.

(2) Personnel and other administrative matters, such as examination questions and answers used in training

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courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(3) Computer software, the release of which would allow circumvention of a statute or Department of the Navy rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure the possibility of circumvention exists.

(4) Security classification guides.

(b) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include, rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communication, and other like administrative markings.

§ 701.25 Exemption (b)(3).

Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or under criteria established by that statute for withholding or referring to particular types of matters to be withheld. Authorization or requirement may be found in the statute itself or in Executive orders or regulations authorized by, or in implementation of a statute. Examples include:

(a) National Security Agency Information Exemption, Pub. L. 86-36, Section 6.

(b) Confidentiality of identity of employee who complains to the IG (5 U.S.C. App., Inspector General Act of 1978, section 7).

(c) Ethics in Government Act of 1978—Protecting Financial Disclosure Reports of Special Government Employees (5 U.S.C. App., Ethics in Government Act of 1978, section 207(a) (1) and (2)).

(d) Civil Service Reform Act—Representation Rights and Duties, Labor Unions, 5 U.S.C. 7114(b)(4).

(e) Authority to Withhold Unclassified Special Nuclear Weapons Information, 10 U.S.C. 128. This statute prohibits the unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear material.

(f) Authority to Withhold Unclassified Technical Data with Military or Space Application, 10 U.S.C. 130.

(g) Action on Reports of Selection Boards, 10 U.S.C. 618.

(h) Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102.

(i) Confidentiality of Financial Records, 12 U.S.C. 3403.

(j) Communication Intelligence, 18 U.S.C. 798.

(k) Confidential Status of Patent Applications, 35 U.S.C. 122.

(l) Secrecy of Certain Inventions and Withholding of Patents (specific applicable section(s) must be involved, 35 U.S.C. 181 through 188.

(m) Confidentiality of Invention Information, 35 U.S.C. 205.

(n) Procurement Integrity, 41 U.S.C. 423.

(o) Confidentiality of Patient Records, 42 U.S.C. 290dd-2.

(p) Information regarding Atomic Energy: Restricted and Formerly Restricted Data (Atomic Energy Act of 1954), specific applicable exemptions must be invoked (*e.g.*, 42 U.S.C. 2161 through 2168).

(q) Protection of Intelligence Sources and Methods, 50 U.S.C. 403(d)(3).

(r) Protection of identities of US undercover intelligence officers, agents, informants and sources, 50 U.S.C. 421.

(s) Examples of statutes which DO NOT qualify under exemption (b)(3) include: 5 U.S.C. 552a, Privacy Act; 17 U.S.C. 101 *et seq.*, Copyright Act; 18 U.S.C. 793, Gathering, Transmitting or Losing Defense Information to Aid Foreign Governments; 18 U.S.C. 1905, Trade Secrets Act; and 28 U.S.C. 1498, Patent and Copyright Cases.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29722, June 9, 1994]

§ 701.26 Exemption (b)(4).

Those containing trade secrets or commercial or financial information that a naval activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include:

(a) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged such as trade secrets, inventions and discoveries, or other proprietary data.

(b) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(c) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(d) Financial data provided in confidence by private employers in connection with local wage surveys used to fix and adjust pay schedules applicable to the prevailing wage rate for employees within the Department of the Navy.

(e) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(f) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private expense, where the contractor or subcontractor retains a

legitimate proprietary interest in the data under 10 U.S.C. 2320-2321 and DOD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption (b)(3) if it meets the criteria of 10 U.S.C. 130.

(g) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

NOTE: The status of unit prices in awarded in government contracts, once a controversial issue, has become more settled with recent court decisions. The courts have held that disclosure of unit prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and that the possibility of competitive harm was thus too speculative.

§ 701.27 Exemption (b)(5).

Those records containing internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether between agencies or between Department of Defense and Department of the Navy components, except as provided in § 701.27 number (b) through (e). Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(a) Examples include:

(1) Nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of Department of the Navy individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups formed for the purpose of obtaining advice and recommendations.

(3) Nonfactual portions of evaluations by Department of the Navy personnel of contractors and their products.

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(4) Information of a speculative, tentative, or evaluative nature on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(6) Records that are exchanged among agency personnel and between Department of the Navy, Department of Defense, or other agencies in preparation for anticipated administrative proceeding by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(7) Portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, of the internal management, administration, or operation of one or more naval activities, when these records have traditionally been treated by courts as privileged against disclosure in litigation.

(8) Computer software meeting the standards of §701.3(b)(3) which is deliberative in nature, the disclosure of which would inhibit or chill the decision making process. In that situation, the use of software must be closely examined to ensure its deliberative nature.

(9) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(b) If any such intra- or interagency record or reasonably segregable portion of such record would be made available routinely through the "discovery process" (the legal process by which litigants obtain information from each other relevant to the issues in a trial or hearing) in the course of litigation with Department of the Navy, such record, should not be withheld even though discovery has not been sought in actual litigation. If, the information could only be made available through

the discovery process by special order of the court based on the needs of a litigant balanced against the interests of the Department of the Navy in maintaining its confidentiality, the record or document need not be made available under this instruction. Consult with legal counsel to determine whether exemption (b)(5) material would be routinely made available through the discovery process.

(c) Intra- or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely available through "discovery" and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(d) A direction or order from a superior to a subordinate contained in internal communication cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(e) An internal communication on a decision subsequently made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

§ 701.28 Exemption (b)(6).

Information in personnel and medical files, and similar files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act (PA) system of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(a) Examples of files other than personnel and medical files containing similar personal information include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates

for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(b) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, lists of Department of the Navy military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(1) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(2) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under exemption (b)(6).

(c) This exemption is relevant to a request for information that is intimate to an individual or that possibly could have adverse effects upon that individual or his or her family if disclosed. Subpart F of this Part 701 lists several examples of non-derogatory information about the official character of a naval member or employee that can routinely be disclosed to a member of the public without constituting a clearly unwarranted invasion of personal privacy of the individual concerned.

(d) Individuals' personnel, medical, or similar files may be withheld from

them or their designated legal representative only to the extent consistent with PA.

(e) When determining whether a release is "clearly unwarranted," the public interest in release must be balanced against the sensitivity of the privacy interest threatened. For example, lists of names and duty addresses of Department of the Navy personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories must be withheld because release could aid in the targeting of Department of the Navy employees and their families by terrorists. See paragraph (p) of §701.8 regarding requests for mailing lists.

(f) When withholding information solely to protect the personal privacy of the subject of the record, information should not be withheld from that individual or from his or her designated representative. The personal privacy of others discussed in that record may constitute a basis for deleting reasonably segregable portions of the record even when providing it to the subject of the record. This exemption shall not be exercised in an attempt to protect the privacy of a deceased person but may be used to protect the privacy of the deceased person's family.

(g) Individual's personnel, medical, or similar file may be withheld from them or their designated legal representative only as consistent with SECNAVINST 5211.5C, "Personal Privacy and Rights of Individuals Regarding Records Pertaining to Themselves."

(h) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical, or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

§ 701.29 Exemption (b)(7).

Records or information compiled for law enforcement purposes, (i.e., civil, criminal, or military law, including

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the implementation of Executive orders or regulations issued pursuant to law). This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

(a) This exemption applies, however, only to the extent that production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A));

(2) Would deprive a person of the right to a fair trial or an impartial adjudication (5 U.S.C. 552(b)(7)(B));

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C));

(i) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, naval activities shall neither confirm nor deny the existence or non-existence of the record being requested.

(ii) A refusal to “neither confirm nor deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no records” response when a record does not exist and a “refusal to neither confirm nor deny” when a record does exist will itself disclose personally private information.

(iii) Refusal to “neither confirm nor deny” should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or, the person whose personal privacy is in jeopardy is deceased, and the agency is aware of that fact.

(4) could reasonably be expected to disclose the identity of a confidential source, including a source within the DON, a state, local, or foreign agency or authority, or any private institution which furnishes information on a confidential basis; could disclose information furnished from a confidential source and obtained by a criminal law

enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D));

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)); or,

(6) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(b) Examples include:

(1) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(2) The identity of firms or individuals investigated for alleged irregularities involving contracting with Department of Defense or Department of the Navy when no indictment has been obtained nor any civil action filed against them by the United States.

(3) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within Department of Defense, or a lawful national security intelligence investigation conducted by an authorized agency or office within Department of Defense. National security intelligence investigations include background security investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(c) The right of individual litigants to investigate records currently available by law.

(d) When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by SECNAVINST 5211.5C, “Personal Privacy and Rights of Individuals Regarding Records Pertaining to Themselves.”

(e) *Exclusions.* Excluded from this exemption are the following two situations:

(1) Whenever a request is made which involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, naval activities may, during only such times as those circumstances continue, treat the records or information as not subject to exemption 7. In such situation, the response to the requester will state no records were found.

(2) Whenever informant records maintained by a criminal law enforcement organization within DON under the informant's name or personal identifier, the naval activity may treat the records as not subject to exemption 7, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to exemption 7, the response to the requester will state no records were found.

§ 701.30 Exemption (b)(8).

Exempts those records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

§ 701.31 Exemption (b)(9).

Exempts those records containing geological and geophysical information and data, including maps, concerning wells.

Subpart C—Addresses for Department of the Navy Records and Locations for Public Inspection

SOURCE: 56 FR 66590, Dec. 24, 1991, unless otherwise noted.

EDITORIAL NOTE: At 56 FR 66586, 66590, Dec. 24, 1991, §§701.21-701.32 (subparts B and C) were revised. Section 701.31 appears at both subpart B and subpart C.

§ 701.31 Addresses for requests for Department of the Navy records.

The following addresses delineate the location of commonly requested information. Members of the public are encouraged to write directly to the official having cognizance over the record(s), as it will expedite processing. When the official having custody of the record is not known, the request should be addressed to the originating official or the official having primary responsibility for the subject matter involved. The following are the most commonly requested types of records:

(a) *Audit reports.* Send requests for internal audit matters to the Auditor General of the Navy, P.O. Box 1206, Falls Church, VA 22041-0206.

(b) *Chaplain Corps.* Send requests for religious affairs matters to the Chief of Chaplains, Navy Department, Washington, DC 20370-2000.

(c) *Civilian personnel records.* (1) Send requests for personnel records of current civilian employees, or those separated from Federal employment less than 30 days, to the employing installation marked for the attention of the civilian personnel officer.

(2) Send requests for individuals formerly employed by the Department of the Navy, or separated from Federal employment for more than 30 days, to the Director, National Personnel Records Center, (Civilian Personnel Records), 111 Winnebago Street, St. Louis, MO 63118.

(d) *Contractual/procurement records and related matters.* (1) Send requests for copies of Navy procurement directives and Defense Federal Acquisition Regulations (DFARs) to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(2) Send requests for copies of current contracts to the contracting officer or head of the procurement activity when known. If unknown, submit requests for Navy contracts to the Chief of Naval Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000, and Marine Corps contracts to the Deputy Chief of Staff for Installations and Logistics, Headquarters U.S. Marine Corps, 2 Navy Annex, Washington, DC 20380-0001.

(e) *Courts-martial records.* (1) Send requests for records of trial by general courts-martial, or special courts-martial which resulted in a bad conduct discharge, or involving commissioned officers to the Judge Advocate General, Code 20, 200 Stovall Street, Alexandria, VA 22332-2400.

(2) Send requests for records of trial by summary courts-martial or special courts-martial not involving a bad conduct discharge to the officer having supervisory authority in the review process.

(f) *Naval Inspector General Reports.* Send requests for Navy hotline complaints and all other investigations and inspections conducted by the NAVINSGEN to the Naval Inspector General, Building 200, room 100, 901 M Street SE., Washington, DC 20374-5006. Send requests for local command Inspector General reports to the local IG office.

(g) *Investigative records.* (1) Send requests for NCIS investigatory records and related matters to the Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, 901 M Street SE., Washington, DC 20388-5380.

(2) Send requests for JAG Manual investigative reports to the Judge Advocate General (Code 33), Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(3) Send requests for mishap investigative reports to Commander, Naval Safety Center, 375 A Street, Norfolk, VA 23511-4399.

(h) *Legal matters.* (1) General Counsel legal matters. Those relating to the acquisition, custody, management, transportation, taxation, and disposition of real and personal property, and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof, excepting, however, tort claims and admiralty claims arising independently of contract, and matters relating to the naval petroleum reserves; operations of the Military Sealift Command, excepting tort and admiralty claims arising independently of contract; the Office of the Comptroller of the Navy; procurement matters in the field of patents, inventions, trademarks, copyrights, royalty payments, and similar matters, including

those in the Defense Federal Acquisition Regulations (DFARs), and Navy procurement directives; and, industrial security claims and litigation should be directed to the Office of Counsel of the concerned activity. If unknown, submit to the General Counsel of the Navy, 2211 Jefferson Davis Highway, Arlington, VA 22344-5103.

(2) Judge Advocate General legal matters. In addition to military law, all matters except those outside the jurisdiction of the General Counsel should be directed to the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400.

(i) *Medical records.* (1) Send requests for inpatient medical treatment records of active duty Navy and Marine Corps personnel and their dependents to the medical treatment facility where the patient is or was treated. The records are held for two years and then retired to the National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132-5100.

(2) Send requests for outpatient medical treatment records of active duty Navy and Marine Corps personnel and their dependents to the military treatment facility attached to the command at which they are assigned.

(3) Send requests for outpatient medical records of Navy personnel separated (discharged, retired, or deceased) for less than 4 months to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800. After four months, send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100. Send requests for dependents' outpatient records to the last medical facility where treatment was provided if within 2 years of sponsor's release/separation from the service. After the 2 years, send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100.

(4) Send requests for outpatient medical records of Marine Corps personnel separated (discharged, retired, or deceased) for less than four months to Director, Marine Corps Reserve Support Center, 10950 El Monte Street, Overland Park, KS 66211-1408. After four months,

send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100. Requests for dependents' outpatient records should be addressed to the last medical facility where treatment was provided if within 2 years of active duty member's release/separation from the service. After two years, send requests to Director, National Personnel Records Center, (Military Records Center), 9700 Page Avenue, St. Louis, MO 63132-5100.

(5) When the location of a military member or dependent's medical record is not known, send requests to Chief, Bureau of Medicine and Surgery, 2300 E Street, NW., Washington, DC 20372-5120.

(6) Send requests for medical records of drilling reservists to the reserve centers where they are assigned.

(7) Send requests for medical records of inactive or retired reservists to Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(8) *Civilian employee medical records.* Send requests to the medical facility where the person is/was treated. After 2 years, send requests to Director, National Personnel Records Center, (Civilian Personnel Records), 111 Winnebago Street, St. Louis, MO 63118.

(j) *Military personnel records.* (1) Send requests for records of active duty Navy personnel, or those separated (discharged, retired or deceased for up to 1 year) to Chief of Naval Personnel, 2 Navy Annex, Washington, DC 20370-5001 and for Marine Corps personnel to Commandant of the Marine Corps, (Code MM), Navy Department, Washington, DC 20380-0001.

(2) Send requests for records of Navy and Marine Corps personnel separated (discharged, retired or deceased) for more than 1 year and inactive reservists to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100.

(3) Send requests for former officer personnel separated prior to 1902 and former enlisted personnel separated prior to 1885 to Chief, Military Reference Branch, Military Archives Division, National Archives, Washington, DC 20408.

(4) Send requests for records of drilling reservists to the member's servicing personnel support unit.

(5) Send requests for records of inactive duty reservists who still have an obligation to the Navy to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(6) Send requests for records of separated reservists who have not retired to the Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132-5100.

(7) Send requests for records of retired reservists to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(k) *Publications.* (1) Send requests for unclassified instructions, other than Secretary of the Navy Instructions, issued under the Department of the Navy's directives issuance system and subject index thereof (NAVPUBINST 5215.1B) to the Aviation Supply Office, Naval Publications and Forms Directorate, Customer Service, Code 1013, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

(2) Send requests for all SECNAVINSTs and OPNAVINSTs marked FOUO or classified to the CNO (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000.

(3) Send requests for Marine Corps directives, publications, and manuals to Commandant of the Marine Corps, (Code AR), HQ USMC, 2 Navy Annex, Washington, DC 20380-0001.

(4) Send requests for military specifications, standards, and handbooks to the Commanding Officer, Defense Printing Service Detachment Office, Customer Service, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094.

(l) *Research records.* Send requests for records regarding basic research and grants to the activity having custody of the record. If unknown, send to the Chief of Naval Research, 800 North Quincy Street, Arlington, VA 22217-5660.

(m) *Systems commands*—(1) *Aeronautical weapon systems.* Send requests for information on aeronautical weapon systems, associated sub-systems and related systems and equipment to the

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Commander, 1421 Jefferson Davis Highway, Arlington, VA 22243-5120.

(2) *Facilities*. Send requests for information on facilities and land management (design, construction, and maintenance; utilities; housing; and real estate matters) to the Commander, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332-2300.

(3) *Ships*. Send requests for information on ships and ordnance materials to the Commander, Naval Sea Systems Command, 2531 Jefferson Davis Highway, Arlington, VA 22242-5160.

(4) *Space and Naval Warfare*. Send requests for information on development technologies regarding battle force architecture and engineering, space communications, navigation, undersea and ocean surveillance, oceanographic matters, anti-submarine warfare, information transfer systems, and information management systems to the Commander, Space and Naval Warfare Systems Command, 2451 Crystal Drive, Arlington, VA 22245-5200.

(5) *Supply*. Send requests for information on naval supply matters to the Commander, Naval Supply Systems Command, 1931 Jefferson Davis Highway, Arlington, VA 22341-5360, and for Marine Corps supply matters to the Commandant of the Marine Corps, HQ USMC, 2 Navy Annex, Washington, DC 20380-0001.

(n) *Ships decklogs*. Send requests for ships decklogs originating after 30 June 1945 to the Director, Naval Historical Center, Ships' Histories Branch, 901 M Street SE., Washington Navy Yard, Washington, DC 20374-0571. Those originated prior to 1945 are held by the Chief, Military Reference Branch, Military Archives Division, National Archives, Washington, DC 20408.

(o) *Supply catalogs*. Send requests for Navy and Federal supply catalogs, master cross-reference indexes, and related cataloging publications (cataloging handbooks such as H2-1 and H2-3 and Federal manuals for supply cataloging, such as M1-1, -2 and -3) to Superintendent of Documents, United States Government Printing Office, Washington, DC 20402-9325.

(p) *Technical reports*. Send requests for unclassified technical reports or publications to the Director, National

Technical Information Service, 5285 Port Royal Road, Springfield, VA 20402.

(q) *Unknown*. If requesters are unable to determine the official having cognizance over the requested records, they should send their request for naval matters to the Chief of Naval Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000, and Marine Corps matters to Commandant of the Marine Corps (Code ARAD), HQ USMC, 2 Navy Annex, Washington, DC 20380-0001.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29722 June 9, 1994]

§ 701.32 Locations at which Department of the Navy records are available for public inspection.

(a) *Navy Department Library*. The Navy Department Library is located at the Washington Navy Yard, Building 44, 9th and M Streets, SE, Washington, DC 20374-0571.

(1) *Hours of Operation*. 9 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held*. The library has 130,000 volumes of information of interest to the Navy, such as naval and general history, international law and diplomacy, naval architecture and shipbuilding, naval customs and traditions, naval shore stations, yards and bases, uniforms, insignia, awards and flags, geography, travel and guide books, aviation, Navy music, etc. Also contained are approximately 5,000 rare book collections. Additionally, the library has an index by subject matter of materials held, i.e., NAVPUBINST 5215.1B, Consolidated Subject Index, a quarterly publication which lists instructions originated by Washington Headquarters organizations and Marine Corps directives system checklist of directives distributed outside Headquarters, U.S. Marine Corps. The library is equipped with desks and study carrels for library users and has specialized devices to facilitate research, such as microfilm reader/printers, copy machines, and outlets for tape recorders.

(b) *Defense Reading Room*. The Defense Reading Room is located in Room 2E165 of the Pentagon, Washington, DC 20310-1400. Due to building security, upon arrival at the Pentagon, call 695-

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3973 to arrange for an escort to the Reading Room.

(1) *Hours of Operation.* 8 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held.* Microfiche copies of indexes and decisional documents regarding Navy Discharge Review Board and Board for Correction of Naval Records proceedings.

(c) *Law Library of the Judge Advocate General.* The law library is located at the Hoffman Building 2, Room 9S47, 200 Stovall Street, Alexandria, VA 22332-2400.

(1) *Hours of Operation.* 9 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held.* The library has published and unpublished decisions of the Navy-Marine Corps Court of Military Review, Navy and Marine Corps directives, miscellaneous superseded manuals, and courts-martial orders and the Navy Department Bulletin.

Subpart D—Fee Guidelines

SOURCE: 56 FR 66592, Dec. 24, 1991, unless otherwise noted.

§ 701.40 FOIA fees.

(a) *Background.* The FOIA Reform Act of 1986 brought about significant changes on how FOIA fees are assessed. Subpart D of this part highlights in detail the changes made and conforms with the Office of Management and Budget (OMB) Uniform Fee Schedule and Guidelines which were issued as a result of the Reform Act. OMB guidelines for fees reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which are permitted by FOIA.

(b) *DD Forms 2086/2086-1.* Naval activities are encouraged to utilize DD Forms 2086/2086-1 to track costs for each FOIA request processed, unless a standard processing cost can be computed for routine kinds of requests. The form is designed to track all costs and is utilized to compile fee information for the Annual FOIA Report. While not all costs can be charged to the requester for recoupment, they are nonetheless reportable as they provide

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Congress with an indepth look at the costs and time the Navy is expending to process FOIA requests.

(c) *Scope.* (1) The guidelines set forth below are not intended to imply that fees must be charged for providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as those in NAVCOMPTRAN, Vol. 3, CH-339, which does not supersede the collection of fees under FOIA.

(2) Subpart D of this part does not supersede fees chargeable under a statute specifically setting the level of fees for particular types of records. A “statute specifically providing for setting the level of fees for particular types of records” means any statute that enables a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Naval activities should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory based fee schedule programs such as GPO or NTIS, inform requesters of the steps necessary to obtain records from those sources.

(c) *Resolution of fees.* The issue of fees should be resolved prior to a naval activity expending resources to process a FOIA request. Specifically, a requester should have an opportunity to decide whether or not to pursue a request if fees are applicable and the requester has failed to agree to pay those fees. There have been instances where naval activities have worked a costly request only to be told by the requester that it is no longer needed, since it will result in a cost. Additionally, if a requester has agreed to pay fees up to a specified amount and the costs of processing the request will exceed those fees, naval activities must resolve the issue of additional fees prior to continuing with the processing of the request.

(d) *Responses.* Naval activities shall ensure that final responses to the requester address FOIA fees.

EDITORIAL NOTE: At 56 FR 66592, Dec. 24, 1991, § 701.40 was revised. Paragraph (c) was inadvertently added twice. The duplicate designations are of differing content.

§ 701.41 Definitions.

The following definitions set forth the parameters for determining FOIA fees:

(a) *Direct costs.* Direct costs means those expenditures a naval activity actually incurs in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the employee's basic rate of pay plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. Not included are overhead expenses such as costs of space, heating, or lighting the facility where records are stored.

(b) *Search time.* Search time includes all time spent looking for material responsive to a request and a page-by-page or line-by-line identification (if necessary) of material in the document to determine if it, or portions thereof, are responsive to the request. Naval activities should ensure that searches are efficient and completed in the least expensive manner to minimize costs to the naval activity and the requester. For example, naval activities should not do a line-by-line search when duplicating an entire document containing responsive information would be less expensive and quicker to comply with the request. Time spent reviewing documents to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(c) *Duplication.* Duplication refers to the process of making a copy of a document in response to a FOIA request. Copies can be paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc). Every effort will be made to ensure that the copy provided is in a form reasonably usable by requesters. If copies are not clearly usable, the requester will be notified that their copy is the best available and the agency's master copy will be made available for review upon appointment. For duplicating of computer tapes and audiovisuals, the cost, including the operator's time shall be charged. If a naval activity estimates that assessable duplication charges may exceed \$25, it shall notify

the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such notice shall offer the requester the opportunity to confer with naval personnel to reformulate the request to meet his or her needs at a lower cost.

(d) *Review.* Review time refers to examining documents responsive to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include time spent resolving general legal or policy issues on applying the exemptions. Charges may be assessed only for the initial review. Naval activities may not charge for reviews during an administrative appeal of an exemption already applied. Records or portions of records withheld in full under an exemption subsequently determined not to apply, may be reviewed again to determine the applicability of other exemptions not previously considered and the costs for such a subsequent review could be assessed.

(e) *Commercial use request.* A commercial use request is a request from or on behalf of one seeking information for a use or purpose that furthers the commercial, trade, or profit interest of the requester. In determining whether a requester belongs to this category, naval activities must determine the requester's use of the documents requested. Naval activities should seek additional clarification before assigning the request to a specific category when doubting the intended use of the requester, or where the use is not clear from the request itself.

(f) *Educational institution.* An educational institution is a preschool, public or private elementary or secondary school, institution of graduate higher education, institution of undergraduate higher education, institution of professional education, and an institution of vocational education operating a program(s) of scholarly research.

(g) *Non-commercial scientific institution.* A non-commercial scientific institution is operated solely for conducting scientific research the results of which

are not intended to promote any particular product or industry and not operated on a “commercial” basis.

(h) *Representative of the news media.* Representative of the news media is a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. “News” means information about current events or of current interest to the public. Examples of news media entities include television or radio station broadcasting to the public at large and publishers of periodicals when qualifying as disseminators of “news” who make their products available for purchase or subscription by the general public. Those examples are not all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services) alternative media would be included in this category. “Free-lance” journalists may be considered as working for a news organization if they can demonstrate a basis for expecting publication by that organization, even if not actually employed. Proof may be by publication contract, but in alternative media may also look to the requester’s past publication record in making this determination. Representatives of the news media do not include private libraries, private repositories of Government records, or middlemen such as information vendors or data brokers.

(i) *All other requesters.* All other requesters refers to persons who do not qualify as an educational institution, non-commercial scientific institution, representative of the news media, or commercial use requester. An example is a nonprofit organization.

§ 701.42 Application.

(a) *Commercial requesters.* When records are requested for commercial use, fees shall be assessed to recover reasonable standard charges for document search, review, and duplication. Requesters must reasonably describe the records sought. When naval activities review a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters, are not

entitled to 2 hours of free search time and 100 free pages of reproduction of documents. However, fees totaling \$15 or less must be waived. Commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. Because use of the requested material is the exclusive determining criteria, a commercial enterprise may make a request that is not for commercial use. It is also possible that a nonprofit organization could make a request for commercial use. Such situations must be addressed on a case-by-case basis.

(b) *Educational institution requesters.* When a request is made by an educational institution whose purpose is scholarly research fees shall be limited to reasonable standard charges for document duplication (excluding charges for the first 100 pages). Requesters must reasonably describe the records being sought and must show that the request is made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly research.

(c) *Non-commercial scientific institution requesters.* When the request is made by a non-commercial scientific institution whose purpose is scientific research fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages). Requesters must reasonably describe the records sought and must show that the request is being made under the auspices of a qualifying institution and that records are not sought for commercial use, but in furtherance of scientific research.

(d) *Representatives of the news media.* (1) When the request is made by a representative of the news media, fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages). Requesters must reasonably describe the records sought.

(2) Representatives of the news media must meet the criteria defined in paragraph (h) of § 701.41, and the request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a

request that is for a commercial use. For example, a request by a newspaper for records relating to an investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of duplication alone (excluding charges for the first 100 pages).

(3) "Representative of the news media" does not include private libraries, private repositories of Government records, or middlemen, such as information vendors or data brokers.

(e) *All other requesters.* Naval activities shall charge requesters who do not fit into any of the above categories fees to recover the full direct cost of search and duplicating records, except the first 2 hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought. Requests from subjects about themselves will continue to be treated under the fee provisions of 5 U.S.C. 552a, which permit fees only for duplication. Naval activities are reminded that this category of requester may be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest.

§ 701.43 Fee restrictions.

(a) A naval activity may not charge fees if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. Except for requesters seeking documents for a commercial use, naval activities shall provide the first 2 hours of search time and the first 100 pages of duplication without charge. For example, for a request (other than one from a commercial requester) involving 2 hours and 10 minutes of search time and 105 pages of documents, a naval activity would recover the cost of only ten minutes of search time and five pages of duplication. If this processing cost was equal to or less than the cost to the naval activity for billing the requester and processing the fee collected (i.e., \$15), no charges would result.

(b) Requesters are entitled to the first 2 hours of search and 100 pages of duplication without charge once per re-

quest. Consequently, if after completing its portion of a request, a naval activity, refers the request to another naval activity to act on their portion of the request, the referring naval activity shall inform the recipient of the amount of search time and duplication cost to date so the final Navy response will address all fees in the processing of the request. For referrals to other federal agencies or Department of Defense components, if the naval costs of processing the request are chargeable based on fee guidelines, the fees should be collected from the requester and the recipient of the referral advised of the fee status of the request. If the fees are not chargeable based on the fee guidelines, the recipient of the referral should be advised of the naval fees associated with the processing of the request.

(c) In determining the "cost of collecting a fee" consider administrative costs to the naval activity of receiving and recording a remittance, and processing the fee for deposit in the Treasury Department's special account. The Treasury's cost to handle such remittance is negligible and shall not be considered in a naval activity's determination.

(d) To determine cost, "pages" refers to standard size paper copies normally 8 1/2" x 11" or 11" x 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printouts, meets the restriction.

(e) For computer searches, the first 2 free hours will be determined by the salary scale of the individual doing the computer search. For example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24 (2 hours of equivalent search at the clerical level), computer costs in excess of that amount are chargeable as computer search time.

§ 701.44 Fee waivers.

(a) When the naval activity determines that waiver or reduction of fees is in the public interest, documents will be furnished without charge or at a reduced charge. It is in the public interest when furnishing the information

is likely to contribute significantly to public understanding of the operations or activities of the Department of the Navy, and is not primarily in the commercial interest of the requester.

(b) Fees shall be waived automatically for all requesters when direct costs for a FOIA request total \$15 or less.

(c) Decisions to waive or reduce fees that exceed the automatic fee waiver threshold shall be made on a case-by-case basis when:

(1) Disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”

(i) *Subject of the request.* Naval activities should analyze whether the subject matter of the request involves issues which will significantly contribute to the public understanding of the operations or activities of the Department of the Navy. Requests for records in the possession of the Department of the Navy originated by non-government organizations and sought for their intrinsic content rather than informative value will not likely contribute to public understanding of the operations or activities of the Department of the Navy. Examples of such records are press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a naval activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of the Navy; however, the age of a particular record shall not be the sole criteria for determining the value of a document. These requests must be closely reviewed while considering the requester’s stated purpose for the records and the potential for public understanding of the operations and activities of the Department of the Navy.

(ii) *Informative value of the information to be disclosed.* Naval activities should analyze the substantive contents of a record or portion of the record to determine whether disclosure is meaningful and will inform the public on Department of the Navy’s operations or activities. While the subject of a request may contain information

on operations or activities of the Department of the Navy, it may not have great potential for contributing to a meaningful understanding of these operations or activities. An example would be a heavily redacted record, with only random words, fragmented sentences, or paragraph headings. A determination as to whether that type of record will contribute to the public understanding of the operations or activities of the Department of the Navy must be weighed against the requester’s intended use. Another example is disclosure of information already in the public domain or nearly identical information may add no meaningful new information on Department of the Navy operations and activities.

(iii) *Contribution to the public’s understanding from disclosure.* Disclosure contributes to the public’s understanding when disclosure will inform or have the potential to inform the public, rather than the individual requester or small segment of interested persons. The requester’s identity determines whether the requester has the capability and intention to disseminate the information to the public. Assertions of plans to write a book, research a particular subject, doctoral dissertation work, or indigency are insufficient. Requester must demonstrate the capacity to disclose the information in a manner informative to the general public. Requesters should describe their qualifications, nature of their research, purpose of the requested information, and intended means of dissemination to the public.

(iv) *The significance of the contribution to public understanding.* Naval activities must assess the significance or impact of disclosure against the current level of public knowledge or understanding prior to the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previous unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public. Naval activities shall not make value judgments whether the information is important enough to be made public.

(2) Disclosure of the information “is not primarily in the commercial interest of the requester.”

(i) *Existence and magnitude of a commercial interest.* If the request is a commercial interest, naval activities should address the magnitude of that interest to see if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether this is a commercial requester, naval activities may infer it from the requester's identity and circumstances of the request. The requester's commercial benefit must clearly override any personal or non-profit interest to apply FOIA commercial standards.

(ii) *The primary interest in disclosure.* Once a requester's commercial interest has been determined, naval activities should then determine if disclosure would be primarily in that interest. That requires balancing the commercial interest of the request against any public benefit derived as a result of that disclosure. Where the public interest served is beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists and the relative commercial interest of the requester is greater than the public interest, then a waiver or reduction of fees would be inappropriate. For example, while news media organizations have a commercial interest as business organizations, their role of disseminating news to the public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest is secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research may recognize a commercial benefit, either directly or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and charging a fee would be inappropriate. Conversely, data brokers or others who compile government information for marketing can normally be presumed to primarily have a commercial interest.

(iii) *The above factors and examples are not all inclusive.* Each fee decision must be considered on a case-by-case basis the merits of the information provided in each request. When the decision to charge, reduce, or waive the fee cannot be clearly resolved, naval activities should rule in favor of the requester.

(d) The following additional circumstances describe situations where waiver or reduction of fees are most likely warranted:

(1) A record is voluntarily created to preclude an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

(2) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g., \$15 - \$30).

§ 701.45 Fee assessment.

(a) Fees may not be used to discourage requesters. FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters), and duplication.

(b) To be responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, naval activities shall:

(1) Analyze each request to determine the category of the requester. If the naval activity's determination of the category of the requester is different than that claimed by the requester, the naval activity will:

(i) Notify the requester that additional justification should be provided to support the category claimed, and that a search for responsive records will not be initiated until agreement on the category of the requester. Absent further category justification from the requester and a reasonable period of time (i.e., 30 calendar days), the naval activity shall render a final category determination and notify the requester of the determination, including administrative appeal rights.

(ii) Advise the requester that a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs for the category determined by the naval activity.

(2) Requesters must submit a fee declaration appropriate for these categories:

(i) Commercial requesters must indicate a willingness to pay all search, review, and duplication costs.

(ii) *Educational or non-commercial scientific institution or news media representatives.* Requesters must indicate a willingness to pay duplication charges in excess of 100 pages, if more than 100 pages of records are desired.

(iii) *All others.* Requesters must indicate a willingness to pay assessable search and duplication costs if more than 2 hours of search effort or 100 pages of records are desired and the resultant fees will exceed the \$15 fee waiver threshold.

(3) If the above conditions are not met, then the request need not be processed and the requester shall be so informed within 10 working days.

(4) As described above, naval activities must be prepared to provide an estimate of assessable fees to the requester. While searches vary among naval activities and an estimate is often difficult prior to an actual search, requesters desiring estimates are entitled to them before committing to a willingness to pay. Should naval activity costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the amount agreed to shall not be charged without the requester's agreement.

(5) A naval activity may not require advance payment of any fee (i.e., payment before work is commenced or continued on a request) unless the requester previously failed to timely pay fees or the agency determined that the fee exceeds \$250. A timely fashion is 30 calendar days from the date of billing by the naval activity.

(6) Where a naval activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250, the naval activity should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges for requesters without a history of payment.

(7) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the naval activity may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that the fee had been paid, and to make an advance payment of the full amount of the estimated fee before the naval activity begins to process a new or pending request. Interest will be at the rate prescribed in 31 U.S.C. 3717 and confirmed with respective accounting and finance offices.

(8) After all work is completed on a request and the documents are ready for release, naval activities may request payment prior to forwarding the documents if there is no payment history on the requester or if the requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days of the billing). If the requester fails to pay in a timely fashion, paragraph (b)(7) of § 701.45 applies. Naval activities may not hold documents ready for release pending payment from requesters with a history of prompt payment.

(9) When naval activities act under § 701.45 number (b)(1) through (7), FOIA time limits (10 working days from receipt of initial requests and 20 working days from receipt of appeals, plus permissible extensions of time) begin after the naval activity has received a willingness to pay fees or fee payments, if appropriate.

(10) Naval activities may charge for time spent in searching for records, even if that search fails to locate records responsive to the request. Naval activities may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the naval activity estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees up to the estimated amount. Such notice shall offer the requester the opportunity to confer with the naval activity with the object of reformulating the request to meet his or her needs at a lower cost.

§ 701.46 Aggregating requests.

Except for commercial requesters, a naval activity may not charge for the first 2 hours of search time or for the first 100 pages of reproduction. A requester may not file multiple requests at the same time each seeking portions of a document or documents to avoid payment of fees. When a naval activity reasonably believes that a requester or, a group of requesters acting in concert is attempting to break a request into a series of requests to evade fees, the naval activity may aggregate the requests and charge accordingly. In determining whether it is reasonable to aggregate the requests, consider the time period of the requests. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. It is harder to make that presumption for requests over a longer time period. Before aggregating requests from more than one requester, naval activities must have a concrete basis to conclude that the requesters are acting in concert to avoid payment of fees. Naval activities may not aggregate multiple requests from one requester on unrelated subjects.

§ 701.47 Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).

The Debt Collection Act of 1982 (Pub. L. 97-365) provides for a minimum annual rate of interest on overdue debts to the Federal Government. Naval activities may charge an interest penalty for fees outstanding 30 days from the date of billing (the first demand notice). The interest rate shall be as prescribed in 31 U.S.C. 3717. Naval activities should verify the current interest rate with respective accounting and finance offices. After one demand letter has been sent and 30 calendar days have lapsed with no payment, naval activities may submit the debt to the respective accounting and finance offices for collection under the Debt Collection Act of 1982.

§ 701.48 Computation of fees.

The fee schedule in Subpart D of this part shall be used to compute search, review (in the case of commercial requesters), and duplication costs for processing FOIA requests. Costs shall

be computed on time actually spent. Time-based and dollar-based minimum charges for search, review (in the case of commercial requesters), and duplication are not authorized.

§ 701.49 Collection of fees.

Collect FOIA fees when providing the documents to the requester when the requester specifically states that costs are acceptable or acceptable up to a specified amount. Collection may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the naval activity, or the naval activity determines the fee will be in excess of \$250.

§ 701.50 Search time costs.

The following schedules outline authorized fees:

(a) *Manual search.*

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	\$12
Professional	01-06/GS9-GS/GM15	25
Executive	07/GS/GM16/ES1 and above.	45

(b) *Computer search.* Computer search is based on the direct cost of the central processing unit, input-output devices, and memory capacity of the computer configuration. The cost of computer search is based on the computer operator/programmer's time in determining how to conduct and subsequently executing the search and is charged at the rate of a manual search.

(c) *Duplication costs.*

Type	Cost per Page
Pre-printed material (i.e., unaltered directives, publications)	\$.02
Office copy (i.e., xeroxed copies) .....	.15
Microfiche .....	.25
Computer copies (tapes or reprints)	Actual cost ¹

¹ This means the cost of duplicating the tape or printout, which includes the operator's time and cost of the tape.

(d) *Review time (only applies in the case of commercial requesters).*

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	\$12
Professional	01-06/GS9-GS/GM15	25

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Type	Grade	Hourly Rate
Executive	07/GS/GM16/ES1 and above.	45

(e) *Audiovisual documentary materials.* Compute search costs as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

(f) *Other records.* Compute direct search and duplication cost for any record not described above as described for audiovisual documentary material.

(g) *Costs for special services.* Complying with requests for special services is at the discretion of the naval activity. FOIA and its fee structure do not cover these kinds of services. Naval activities may recover the costs of special services asked for by the requester after agreement has been obtained from the requester to pay for one or more of the following services:

- (1) Certifying that records are true copies.
- (2) Sending records by special methods such as express mail, etc.

§ 701.51 FOIA fee remittance/receipt controls.

(a) Naval activities shall implement procedures to track FOIA fee remittances. At a minimum, the tracking system should include the name of the requester, company (if applicable), amount of fee charged (identify by total and breakdown, i.e., \$250: \$100 search, \$50.00 review, \$100 reproduction), date and serial number of correspondence to the requester which seeks the fee remittance, date remittance received, number of check, date sent to local disbursing office, and copy of NAVCOMPT Form 2277. This tracking system can be manual or automated and should be designed to identify outstanding FOIA remittances so that follow-up letters can be sent advising the requester that his/her account requires prompt action.

(b) Naval activities shall advise requesters to make their check/money order payable to the Treasurer of the United States. Upon receipt of a check/money order, the receiving activity

shall submit a NAVCOMPT Form 2277, Voucher for Disbursement and/or Collection, and the check/money order to the local disbursing office for processing. "FOIA Receipt Account Number 3210" shall be annotated on the NAVCOMPT Form 2277 when processing all FOIA fees, except those received by Defense Business Operating Fund (DBOF) and non-appropriated funded (NAF) activities.

(c) Remittances received by DBOF activities shall be made payable to the activity and the requester should indicate on the check "FOIA Remittance." The remittance shall be deposited in the DBOF activity account.

(d) Remittances received by NAF activities shall be made payable to the activity and the requester should indicate on the check "FOIA Remittance." The remittance shall be deposited in the NAF activity account.

[56 FR 66574, Dec. 24, 1991, as amended at 59 FR 29723, June 9, 1994]

§ 701.52 Technical data fees.

(a) *General.* Technical data, recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). This term does not include computer software or data incidental to contract administration, such as financial and/or management information. Technical data requiring release under FOIA, shall be released after the requester pays all reasonable costs for search, duplication, and review of the records to be released.

(b) *Definition.* Technical data means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(c) *Retention of funds.* Naval activities shall retain fees received from releasing technical data. The funds shall be available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with the request. Reasonable costs are the full costs to

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the Government of rendering the service, or fair market value of the service, whichever is greater. Fair market value shall be determined by commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Government. The full cost includes all direct and indirect costs to conduct the search and to duplicate records responsive to the request. This cost is different from the direct costs allowable under the FOIA.

(d) *Waiver.* Naval activities shall waive the payment of costs for technical data when greater than the costs required for release of this same information under FOIA, if:

(1) The request is made by a United States citizen or a United States corporation who certifies that the technical data requested is needed to submit an offer, or determine capability of submitting an offer. The technical data must relate to the product which will be provided to the United States or a contractor with the United States. However, naval activities may require the citizen or corporation to pay a deposit of not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(2) The release of technical data is requested to comply with an international agreement; or,

(3) The naval activity determines that waiver is in the interest of the United States.

(e) *Fee rates.* (1) Search time is computed as follows:

(i) Manual Search.

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	\$13.25
(Minimum Charge) ..	.....	8.30

Professional and Executive hourly rate of fees are established at actual hourly rate prior to search. A minimum charge will be established at 1/2-hourly rates.

(ii) Computer search is the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage for the computer analyst/operator determining how to conduct and

subsequently executing the search will be recorded as part of the computer search and is at the same rate of the manual search scale.

(2) Duplication costs are as follows:

Type	Cost
Aerial photographs, specifications, permits, charts, blueprints, and other technical documents	\$2.50 each
Engineering data (microfilm):	
Aperture cards:	
Silver duplicate negative	\$.75 per card
(When keypunched and verified) .....	.85 per card
Diaz duplicate negative .....	.65 per card
(When keypunched and verified) .....	.75 per card
35mm roll film	\$.50 per frame
16mm roll film .....	.45 per frame
Paper prints (engineering drawings)	\$1.50 each
Paper reprints of microfilm indices .....	.10 each

(3) Review time is computed as follows:

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	\$13.25
(Minimum Charge) ..	.....	8.30

Professional and Executive hourly rate of fees are established at actual hourly rate prior to review. A minimum charge will be established at 1/2-hourly rates.

§ 701.53 Other technical data records.

Charges for services not specifically provided above are at the following rates:

Type	Cost
Minimum charge for office copy (up to six images)	\$3.50
Each additional image .....	.10
Each typewritten page	3.50
Certification and validation with seal	5.20
Hand-drawn plots and sketches, each hour or fraction thereof	12.00

Subpart E—Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and Other Documents Affecting the Public

SOURCE: 59 FR 46760, Sept. 12, 1994, unless otherwise noted.

§ 701.61 Purpose.

This subpart implements 5 U.S.C. 552(a)(1) and (2) and provisions of Department of Defense Directive 5400.7, May 13, 1988 (32 CFR part 286, 55 FR 53104); Department of Defense Directive 5400.9, December 23, 1974 (32 CFR part 336, 40 FR 4911); and the Regulations of the Administrative Committee of the Federal Register (1 CFR chaps. I and II) by delineating responsibilities and prescribing requirements, policies, criteria, and procedures applicable to:

(a) Publishing the following Department of the Navy documents in the FEDERAL REGISTER:

(1) Certain classes of regulatory, organizational, policy, substantive, and procedural documents required to be published for the guidance of the public;

(2) Certain classes of proposed regulatory documents required to be published for public comment prior to issuance; and

(3) Certain public notices required by law or regulation to be published;

(b) Making available, for public inspection and copying, certain classes of documents having precedential effect on decisions concerning members of the public;

(c) Maintaining current indexes of documents having precedential effect on decisions concerning members of the public, and publishing such indexes or making them available by other means;

(d) Receiving and considering petitions of members of the public for the issuance, revision, or cancellation of regulatory documents of some classes; and

(e) Distributing the FEDERAL REGISTER for official use within the Department of the Navy.

§ 701.62 Scope and applicability.

This subpart prescribes actions to be executed by, or at the direction of, Navy Department [as defined in § 700.104(c) of this chapter] components and specified headquarters activities for apprising members of the public of Department of the Navy regulations, policies, substantive and procedural rules, and decisions which may affect

them, and for enabling members of the public to participate in Department of the Navy rulemaking processes in matters of substantial and direct concern to the public. This subpart complements subpart A, which implements Navy-wide requirements for furnishing documents to members of the public upon request. That a document may be published or indexed and made available for public inspection and copying under this instruction does not affect the possible requirement under subpart A for producing it for examination, or furnishing a copy, in response to a request made under that subpart.

§ 701.63 Policy.

In accordance with the spirit and intent of 5 U.S.C. 552, the public has the right to the maximum information concerning the organization and functions of the Department of the Navy. This includes information on the policies and the substantive and procedural rules used by the Department of the Navy in its dealings with the public. In accordance with Department of Defense policy described in 32 CFR part 336, 40 FR 4911, moreover, the public is encouraged to participate in Department of the Navy rulemaking when the proposed rule would substantially and directly affect the public.

§ 701.64 Publication of adopted regulatory documents for the guidance of the public.

(a) *Classes of documents to be published.* Subject to the provisions of 5 U.S.C. 552(b) which exempt specified matters from requirements for release to the public [see subpart B of this part], the classes of Department of the Navy documents required to be published on a current basis in the FEDERAL REGISTER are listed below.

(1) *Naval organization and points of contact*—descriptions of the central and field organization of the Department of the Navy and the locations at which, the members or employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(2) *Methods and procedures for business with the public*—statements of the general course and methods by which Department of the Navy functions affecting members of the public are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) *Procedural rules and forms*—rules of procedure for functions affecting members of the public, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations required to be submitted under such rules of procedures; and

(4) *Substantive rules and policies*—substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Department of the Navy. Such rules are commonly contained in directives, manuals, and memorandums.

(i) *“General applicability” defined.* The definition prescribed in 1 CFR 1.1 pertains to the classes of documents contemplated in § 701.64(b)(4).

(ii) *Internal personnel rules and internal practices.* In addition to the other exemptions listed in 5 U.S.C. 552(b) and subpart B of this part, particular attention is directed to the exemption pertaining to internal personnel rules and internal practices.

(iii) *Local regulations.* It is unnecessary to publish in the FEDERAL REGISTER a regulation which is essentially local in scope or application, such as a directive issued by a base commander in the implementation of his responsibility and authority under subpart G of part 700 of this title for guarding the security of the installation or controlling the access and conduct of visitors or tradesmen. However, such publication may be authorized under extraordinary circumstances, as determined by the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate, with the concurrence of the Judge Advocate General.

(iv) *Incorporation by reference.* With the approval of the Director of the Federal Register given in the limited instances authorized in 1 CFR Part 51

and 32 CFR 336.5(c), the requirement for publication in the FEDERAL REGISTER may be satisfied by reference in the FEDERAL REGISTER to other publications containing the information which must otherwise be published in the FEDERAL REGISTER. In general, matters eligible for incorporation by reference are restricted to materials in the nature of published data, criteria, standards, specifications, techniques, illustrations, or other published information which are reasonably available to members of the class affected.

(b) *Public inspection.* When feasible, Department of the Navy and Department of Defense documents published in the FEDERAL REGISTER should be made available for inspection and copying, along with available indexes of such documents, in the same locations used for public inspection and copying of the documents contemplated in § 701.65.

§ 701.65 Availability, public inspection, and indexing of other documents affecting the public.

(a) *Discussion.* Section 552(a) of title 5, United States Code, requires the Department of the Navy to make available for public inspection and copying documents which have precedential significance on those Department of the Navy decisions which affect the public. These documents must be kept readily available for public inspection and copying at designated locations, unless they are promptly published and copies are offered for sale. Additionally, documents issued after July 4, 1967, are required to be indexed on a current basis. These indexes, or supplements thereto, must be published at least quarterly in accordance with the provisions of this paragraph. In determining whether a particular document is subject to the requirements of this paragraph, consideration should be given to the statutory purposes and legal effect of the provisions.

(1) *Statutory purposes.* In general, the purpose of the requirement to provide members of the public with essential information is to enable them to deal effectively and knowledgeably with Federal agencies; to apprise members

of the public of the existence and contents of documents which have potential legal consequences as precedents in administrative determinations which may affect them; and to permit public examination of the basis for administrative actions which affect the public.

(2) *Legal effect.* If a document is required to be indexed and made available under this paragraph, it may not be used or asserted as a precedent against a member of the public unless it was so indexed and made available, or unless the person against whom it is asserted had actual and timely notice of its contents.

(b) *Classes of documents affected.* (1) Subject to the provisions of 5 U.S.C. 552(b) which exempt specified matters from the requirements of public disclosure, the following classes of Department of the Navy documents are included in the requirements of this paragraph:

(i) *Final adjudicative opinions and orders*—opinions (including concurring and dissenting opinions) and orders which are issued as part of the final disposition of adjudication proceedings (as defined in 5 U.S.C. 551) and which may have precedential effect in the disposition of other cases affecting members of the public;

(ii) *Policy statements and interpretations*—statements of policy and interpretations of less than general applicability (i. e., applicable only to specific cases; organizations, or persons), which are not required to be published in the FEDERAL REGISTER, but which may have precedential effect in the disposition of other cases affecting members of the public;

(iii) *Manuals and instructions*—administrative staff manuals, directives, and instructions to staff, or portions thereof, which establish Department of the Navy policy or interpretations of policy that serve as a basis for determining the rights of members of the public with regard to Department of the Navy functions. In general, manuals and instructions relating only to internal management aspects of property or fiscal accounting, personnel administration, and most other “proprietary” functions of the department are not within the scope of this provision.

This provision also does not apply to instructions for employees on methods, techniques, and tactics to be used in performing their duties; for example:

(A) Instructions or manuals issued for audit, investigation, and inspection purposes;

(B) Those which prescribe operational tactics; standards of performance; criteria for defense, prosecution, or settlement of cases; or negotiating or bargaining techniques, limitations, or positions; and

(C) Operations and maintenance manuals and technical information concerning munitions, equipment, and systems, and foreign intelligence operations.

(2) In determining whether a document has precedential effect, the primary test is whether it is intended as guidance to be followed either in decisions or evaluations by the issuing authority’s subordinates, or by the issuing authority itself in the adjudication or determination of future cases involving similar facts or issues. The kinds of orders or opinions which clearly would have precedential effect are those that are intended to operate both as final dispositions of the questions involved in the individual cases presented, and as rules of decision to be followed by the issuing authority or its subordinates in future cases involving similar questions. By contrast, many adjudicative orders and opinions issued within the Department of the Navy operate only as case-by-case applications of policies or interpretations established in provisions of manuals or directives and are not themselves used, cited, or relied on as rules of decision in future cases. In these instances, the underlying manual or directive provisions obviously would have precedential effect, but the orders and opinions themselves would not have. A recommendation by an official who is not authorized to adjudicate, or to issue a binding statement of policy or interpretation in a particular matter would not have precedential effect, though an order, opinion, statement of policy, or interpretation issued by an authorized official pursuant to such recommendation might have that effect.

(c) *Deletion of identifying details.* (1) Although the exemptions from public

disclosure described in 5 U.S.C. 552 and subpart B of this part are applicable to documents which are required to be indexed and made available for public inspection and copying under this paragraph, there is no general requirement that any segregable portions of partially exempt documents be so indexed and made available for public inspection and copying. As a general rule, a record may therefore be held exempt in its entirety from the requirements of this paragraph if it is determined that it contains exempt matter and that it is reasonably foreseeable that disclosure would be harmful to an interest protected by that exemption. An exception to this general rule does exist with regard to a record which would be exempt only because it contains information which, if disclosed, would result in a clearly unwarranted invasion of privacy.

(2) Where necessary to prevent a clearly unwarranted invasion of a person's privacy, identifying details should be deleted from a record which is required to be indexed and made available for public inspection and copying under this paragraph. In every such case, the justification for the deletion must be fully stated in writing in a manner which avoids creating inferences that could be injurious to the person whose privacy is involved. Usual reasons for deletion of identifying details include protection of privacy in a person's business affairs, medical matters, or private family matters; humanitarian considerations; and avoidance of embarrassment to a person.

(d) *Publication of indexes*—(1) *Form of indexes.* Each index should be arranged topically or by descriptive words, so that members of the public may be able to locate the pertinent documents by subject, rather than by case name or by a numbering system.

(2) *Time of publication.* Each component having cognizance of records required under this paragraph to be indexed shall compile and maintain an index of such records on a continually current basis. Each such index was required to initially be published by July 1, 1975. An updated version of each such index, or a current supplement thereto, shall be published by an authorized method at least annually thereafter.

(3) *Methods of publication.* The methods authorized for publication of the indexes contemplated in this paragraph are:

(i) Publication in the FEDERAL REGISTER;

(ii) Commercial publication, provided that such commercial publication is readily available to members of the public, or will be made available upon request and payment of costs (if this method is utilized, information on the cost of copies and the address from which they may be obtained shall be published in the FEDERAL REGISTER); or

(iii) Furnishing internally reproduced copies upon request, at cost not to exceed the direct cost of duplication in accordance with subpart D of this part, provided that it is determined, by an order published in the FEDERAL REGISTER, that the publication of the index by methods § 701.65(d)(3) (i) or (ii) would be unnecessary or impracticable. Such order shall state the cost of copies and the address from which they may be obtained. The Chief of Naval Operations (N09B30) is authorized to issue such an order in a proper case.

(4) *Public inspection of indexes.* In addition to publication by one of the foregoing methods, each index will be made available for public inspection and copying in accordance with § 701.65(e) at the locations where Department of the Navy records are available for public inspection.

(e) *Where records may be inspected.* Locations and times at which Department of the Navy records, and indexes thereof, are available for public inspection and copying are shown in § 701.32.

(f) *Cost.* Fees for copying services, if any, furnished at locations shown in § 701.32 shall be determined in accordance with subpart D of this part.

(g) *Records of the United States Navy-Marine Corps Court of Military Review.* The United States Navy-Marine Corps Court of Military Review is deemed to be a "court of the United States" within the meaning of 5 U.S.C. 551 and is therefore excluded from the requirements of 5 U.S.C. 552. Nevertheless, unpublished decisions of the United States Navy-Marine Corps Court of Military Review, although not indexed, are available for public inspection at the location shown in § 701.32(c).

§ 701.66 Publication of proposed regulations for public comment.

(a) *Discussion.* The requirements of this section are not imposed by statute, but are the implementation of policies and procedures created administratively in 32 CFR part 336. In effect, the pertinent provisions of 32 CFR part 336 establish, within the Department of Defense and its components, procedures that are analogous to the public rulemaking procedures applicable to some functions of other Federal agencies under 5 U.S.C. 553. While the administrative policy of encouraging the maximum practicable public participation in the Department of the Navy rulemaking shall be diligently followed, determinations by the Department of the Navy as to whether a proposed regulatory requirement originated by it comes within the purview of this paragraph and the corresponding provisions of 32 CFR part 336, and as to whether inviting public comment is warranted, shall be conclusive and final.

(b) *Classes of documents affected.* Each proposed regulation or other document of a class described in § 701.64(a) (or a proposed revision of an adopted document of any of those classes) which would “originate” within the Department of the Navy a requirement of general applicability and future effect for implementing, interpreting, or prescribing law or policy, or practice and procedure requirements constituting authority for prospective actions having substantial and direct impact on the public, or a significant portion of the public, must be evaluated to determine whether inviting public comment prior to issuance is warranted. Documents that merely implement regulations previously issued by higher naval authorities or by the Department of Defense will not be deemed to “originate” requirements within the purview of this section. If a proposed document is within the purview of this section, publication to invite public comment will be warranted unless, upon evaluation, it is affirmatively determined both that a significant and legitimate interest of the Department of the Navy or the public will be served by omitting such publication for public comment, and that the document is subject to

one or more of the following exceptions:

(1) It pertains to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy;

(2) It relates to naval management, naval military or civilian personnel, or public contracts (e.g., Navy Procurement Directives), including non-appropriated fund contracts;

(3) It involves interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(4) It is determined with regard to the document, for good cause, that inviting public comment is impracticable, unnecessary, or contrary to the public interest.

(c) *Procedures*—(1) *Normal case.* Unless the official having cognizance of a proposed regulatory document determines under the criteria of § 701.66(b) that inviting public comment is not warranted, he or she shall cause it to be published in the FEDERAL REGISTER with an invitation for the public to submit comments in the form of written data, views, or arguments during a specified period of not less than 30 days following the date of publication. An opportunity for oral presentation normally will not be provided, but may be provided at the sole discretion of the official having cognizance of the proposed directive if he or she deems it to be in the best interest of the Department of the Navy or the public to do so. After careful consideration of all relevant matters presented within the period specified for public comment, the proposed document may be issued in final form. After issuance, the adopted document, and a preamble explaining the relationship of the adopted document to the proposed document and the nature and effect of public comments, shall be published in the FEDERAL REGISTER for the guidance of the public.

(2) *Where public comment is not warranted.* The official having cognizance of a proposed document within the purview of this paragraph shall, if he or she determines that inviting public

comment concerning the document is not warranted under the criteria of § 701.66(b), incorporate that determination, and the basis therefor, in the document when it is issued or submitted to a higher authority for issuance. After issuance, such document shall be published in the FEDERAL REGISTER for the guidance of the public, if required under § 701.64(b).

§ 701.67 Petitions for issuance, revision, or cancellation of regulations affecting the public.

In accordance with the provisions of 32 CFR part 336, the Department of the Navy shall accord any interested person the right to petition, in writing, for the issuance, revision, or cancellation of regulatory document that originates, or would originate, for the Department of the Navy, a policy, requirement, or procedure which is, or would be, within the purview of § 701.66. The official having cognizance of the particular regulatory document involved, or having cognizance of the subject matter of a proposed document, shall give full and prompt consideration to any such petition. Such official may, at his or her absolute discretion, grant the petitioner an opportunity to appear, at his or her own expense, for the purpose of supporting the petition, if this is deemed to be compatible with orderly conduct of public business. The petitioner shall be advised in writing of the disposition, and the reasons for the disposition, of any petition within the purview of this section.

Subpart F—Department of the Navy Privacy Act Program

AUTHORITY: Pub. L. 93-579, 88 stat. 1896 (5 U.S.C. 552a).

SOURCE: 59 FR 55348, Nov. 7, 1994, unless otherwise noted.

§ 701.100 Purpose.

Subparts F and G of this part implement the Privacy Act (5 U.S.C. 552a), and DoD Directive 5400.11¹, and DoD

5400.11-R², (see 32 CFR part 310) and provides Department of the Navy policies and procedures for:

(a) Governing the collection, safeguarding, maintenance, use, access, amendment, and dissemination of personal information kept by Department of the Navy in systems of records;

(b) Notifying individuals if any systems of records contain a record pertaining to them;

(c) Verifying the identity of individuals who request their records before the records are made available to them;

(d) Notifying the public of the existence and character of each system of records.

(e) Exempting systems of records from certain requirements of the Privacy Act; and

(f) Governing the Privacy Act rules of conduct for Department of the Navy personnel, who will be subject to criminal penalties for noncompliance with 5 U.S.C. 552a, as amended by the Computer Matching Act of 1988.

§ 701.101 Applicability.

This subpart and subpart G of this part apply throughout the Department of the Navy. It is also applicable to contractors by contract or other legally binding action, whenever a Department of the Navy contract provides for the operation of a system of records or portion of a system of records to accomplish a Department of the Navy function. For the purposes of any criminal liabilities adjudged, any contractor or any employee of such contractor is considered to be an employee of Department of the Navy. In case of a conflict, this subpart and subpart G of this part take precedence over any existing Department of the Navy directive that deals with the personal privacy and rights of individuals regarding their personal records, except for disclosure of personal information required by 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act and implemented by Secretary of the Navy Instruction

¹Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

²See footnote 1 to § 701.100.

5720.42E³, “Department of the Navy Freedom of Information Act Program.”

§ 701.102 Definitions.

For the purposes of this subpart and subpart G of this part, the following meanings apply.

(a) *Access.* The review or copying of a record or parts thereof contained in a system of records by any individual.

(b) *Agency.* For the purposes of disclosing records subject to the Privacy Act between or among Department of Defense (DoD) components, the Department of Defense is considered a single agency. For all other purposes, Department of the Navy is considered an agency within the meaning of Privacy Act.

(c) *Confidential source.* A person or organization who has furnished information to the Federal Government either under an express promise that the person's or the organization's identity will be held in confidence or under an implied promise of such confidentiality if this implied promise was made before September 27, 1975.

(d) *Defense Data Integrity Board.* Consists of members of the Defense Privacy Board, as outlined in DoD Directive 5400.11 and, in addition, the DoD Inspector General or the designee, when convened to oversee, coordinate and approve or disapprove all DoD component computer matching covered by the Privacy Act.

(e) *Disclosure.* The transfer of any personal information from a system of records by any means of communication (such as oral, written, electronic, mechanical, or actual review), to any person, private entity, or government agency, other than the subject of the record, the subject's designated agent or the subject's legal guardian.

(f) *Federal personnel.* Officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals or survivors thereof, entitled to receive immediate or deferred retirement benefits under any retirement program of

the Government of the United States (including survivor benefits).

(g) *Individual.* A living citizen of the United States or alien lawfully admitted to the U.S. for permanent residence. The legal guardian of an individual has the same rights as the individual and may act on his or her behalf. No rights are vested in the representative of a deceased person under this instruction and the term “individual” does not embrace an individual acting in a non-personal capacity (for example, sole proprietorship or partnership).

(h) *Individual access.* Access to information pertaining to the individual by the individual or his or her designated agent or legal guardian.

(i) *Maintain.* Includes maintain, collect, use, or disseminate.

(j) *Member of the public.* Any individual or party acting in a private capacity.

(k) *Minor.* Under this subpart and subpart G of this part, a minor is an individual under 18 years of age, who is not a member of the U.S. Navy or Marine Corps, nor married.

(l) *Official use.* Under this subpart and subpart G of this part, this term is used when Department of the Navy officials and employees have a demonstrated need for the use of any record or the information contained therein in the performance of their official duties.

(m) *Personal information.* Information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions or public life.

(n) *Privacy Act (PA) request.* A request from an individual for notification as to the existence of, access to, or amendment of records pertaining to that individual. These records must be maintained in a system of records.

(o) *Record.* Any item, collection, or grouping of information about an individual that is maintained by a naval activity including, but not limited to, the individual's education, financial transactions, and medical, criminal, or employment history, and that contains the individual's name or other identifying particulars assigned to the individual, such as a finger or voice print or a photograph.

³Copies available from Chief of Naval Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000.

(p) *Review authority.* An official charged with the responsibility to rule on administrative appeals of initial denials of requests for notification, access, or amendment of records. The Secretary of the Navy has delegated his review authority to the Assistant Secretary of the Navy (Manpower and Reserve Affairs (ASN(M&RA)), the General Counsel (OGC), and the Judge Advocate General (NJAG). Additionally, the Office of Personnel Management (OPM) is the review authority for civilian official personnel folders or records contained in any other OPM record.

(q) *Risk assessment.* An analysis which considers information sensitivity, vulnerability, and cost to a computer facility or word processing center in safeguarding personal information processed or stored in the facility or center.

(r) *Routine use.* Disclosure of a record outside the Department of Defense for a purpose that is compatible with the purpose for which the record was collected and maintained by the Department of Defense. The routine use must have been included in the notice for the system of records published in the FEDERAL REGISTER.

(s) *Statistical record.* A record maintained only for statistical research, or reporting purposes, and not used in whole or in part in making any determination about a specific individual.

(t) *System manager.* An official who has overall responsibility for a system of records. He or she may serve at any level in Department of the Navy. Systems managers are indicated in the published record systems notices. If more than one official is indicated as a system manager, initial responsibility resides with the manager at the appropriate level (i.e., for local records, at the local activity).

(u) *System of records.* A group of records under the control of a Department of the Navy activity from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. System notices for all Privacy Act systems of records must be published in the FEDERAL REGISTER and are also

published in periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211⁴.

(v) *Word processing equipment.* Any combination of electronic hardware and computer software integrated in a variety of forms (firmware, programmable software, hard wiring, or similar equipment) that permits the processing of textual data. Generally, the equipment contains a device to receive information, a computer-like processor with various capabilities to manipulate the information, a storage medium, and an output device.

(w) *Word processing system.* A combination of equipment employing automated technology, systematic procedures, and trained personnel for the primary purpose of manipulating human thoughts and verbal or written communications into a form suitable to the originator. The results are written or graphic presentations intended to communicate verbally or visually with another individual.

(x) *Working day.* All days excluding Saturday, Sunday, and legal holidays.

§ 701.103 Policy.

It is the policy of Department of the Navy to:

(a) Ensure that all its personnel comply fully with 5 U.S.C. 552a, DoD Directive 5400.11 and DoD 5400.11-R, to protect individuals from unwarranted invasions of privacy. Individuals covered by this protection are living citizens of the U.S. or aliens lawfully admitted for permanent residence. A legal guardian of an individual or parent of a minor when acting on the individual's or minor's behalf, has the same rights as the individual or minor. (A member of the Armed Forces is not a minor for the purposes of this subpart and subpart G of this part).

(b) Collect, maintain, and use only that personal information needed to support a Navy function or program as authorized by law or E.O., and disclose this information only as authorized by 5 U.S.C. 552a and this subpart and subpart G of this part. In assessing need, consideration shall be given to alternatives, such as use of information not

⁴See footnote 3 to § 701.101.

individually identifiable or use of sampling of certain data for certain individuals only. Additionally, consideration is to be given to the length of time information is needed, and the cost of maintaining the information compared to the risks and adverse consequences of not maintaining the information.

(c) Keep only personal information that is timely, accurate, complete, and relevant to the purpose for which it was collected.

(d) Let individuals have access to, and obtain copies of, all or portions of their records, subject to exemption procedures authorized by law and this subpart and subpart G of this part.

(e) Let individuals request amendment of their records when discrepancies proven to be erroneous, untimely, incomplete, or irrelevant are noted.

(f) Let individuals request an administrative review of decisions that deny them access, or refuse to amend their records.

(g) Ensure that adequate safeguards are enforced to prevent misuse, unauthorized disclosure, alteration, or destruction of personal information in records.

(h) Maintain no records describing how an individual exercises his or her rights guaranteed by the First Amendment (freedom of religion, political beliefs, speech, and press; peaceful assemblies), and petition for redress of grievances), unless they are:

- (1) Expressly authorized by statute;
- (2) Authorized by the individual;
- (3) Within the scope of an authorized law enforcement activity; or

(4) For the maintenance of certain items of information relating to religious affiliation for members of the naval service who are chaplains. This should not be construed, however, as restricting or excluding solicitation of information which the individual is willing to have in his or her record concerning religious preference, particularly that required in emergency situations.

(5) Maintain only systems of records which have been published in the FEDERAL REGISTER, in accordance with periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211 and

§ 701.105. These OPNAVNOTES 5211 provide a listing of all Department of the Navy Privacy Act systems of records and identify the Office of Personnel Management (OPM) government-wide systems containing information on Department of the Navy civilian employees, even though technically, Department of the Navy does not have cognizance over them. A Privacy Act systems notice outlines what kinds of information may be collected and maintained by naval activities. When collecting/maintaining information in a Privacy Act system of records, review the systems notice to ensure activity compliance is within the scope of the system. If you determine the systems notice does not meet your needs, contact the systems manager or Chief of Naval Operations (N09B30) with your concerns so that amendment of the system may be considered.

§ 701.104 Responsibility and authority.

(a) *Chief of Naval Operations (CNO)*. CNO is designated as the official responsible for administering and supervising the execution of 5 U.S.C. 552a, DoD Directive 5400.11, and DoD 5400.11-R. CNO has designated the Assistant Vice Chief of Naval Operations (N09B30) as principal Privacy Act Coordinator for the Department of the Navy to:

(1) Set Department of the Navy policy on the provisions of the Privacy Act.

(2) Serve as principal advisor on all Privacy Act matters.

(3) Oversee the administration of the Privacy Act program, which includes preparing the Department of the Navy Privacy Act report for submission to Congress.

(4) Develop Navy-wide Privacy Act training program and serve as training-oversight manager.

(5) Conduct staff assistance visits within Department of the Navy to review compliance with 5 U.S.C. 552a and this subpart and subpart G of this part.

(6) Coordinate and prepare responses for Privacy Act requests received for Office of the Secretary of the Navy records.

(b) *Commandant of the Marine Corps (CMC)*. CMC is responsible for administering and supervising the execution of this subpart and subpart G of this

part within the Marine Corps. The Commandant has designated the Director, Manpower Management Information Systems Division (HQMC (Code MI)) as the Privacy Act coordinator for Headquarters, U.S. Marine Corps.

(c) *Privacy Act Coordinator.* Each addressee is responsible for implementing and administering a Privacy Act program under this subpart and subpart G of this part. Each addressee shall designate a Privacy Act Coordinator to:

(1) Serve as principal point of contact on Privacy Act matters.

(2) Provide training for activity/command personnel on the provisions of 5 U.S.C. 552a and this subpart and subpart G of this part.

(3) Issue implementing instruction which designates the activity's Privacy Act Coordinator, Privacy Act records disposition, Privacy Act processing procedures, identification of Privacy Act systems of records under their cognizance, and training aids for those personnel involved with systems of records.

(4) Review internal directives, practices, and procedures, including those having Privacy Act implications and where Privacy Act Statements (PASs) are needed.

(5) Compile input and submit consolidated Privacy Act report to Echelon 2 Privacy Act Coordinator, who, in turn, will provide consolidated report to CNO (N09B30).

(6) Maintain liaison with records management officials (i.e., maintenance and disposal procedures and standards, forms, and reports), as appropriate.

(7) Provide guidance on handling Privacy Act requests and scope of Privacy Act exemptions.

(8) Conduct staff assistance visits within command and lower echelon commands to ensure compliance with the Privacy Act.

(9) Echelon 2 Privacy Act Coordinators shall provide CNO (N09B30) with a complete listing of all Privacy Act Coordinators under their jurisdiction. Such information should include activity name and address, office code, name of Privacy Act Coordinator, commercial and DSN telephone number, and FAX number, if applicable.

(d) *Release authority.* Officials having cognizance over the requested subject matter are authorized to respond to requests for notification, access, and/or amendment of records. These officials could also be systems managers (see § 701.104(g)).

(e) *Denial authority.* Within the Department of the Navy, the following chief officials, their respective vice commanders, deputies, principal assistants, and those officials specifically designated by the chief official are authorized to deny requests, either in whole or in part, for notification, access and amendment, made under this subpart and subpart G of this part, when the records relate to matters within their respective areas of responsibility or chain of command:

(1) *Department of the Navy.* Civilian Executive Assistants; CNO; CMC; Chief of Naval Personnel; Commanders of the Naval Systems Commands, Office of Naval Intelligence, Naval Security Group Command, Naval Imaging Command, and Naval Computer and Telecommunications Command; Chief, Bureau of Medicine and Surgery; Auditor General of the Navy; Naval Inspector General; Director, Office of Civilian Personnel Management; Chief of Naval Education and Training; Commander, Naval Reserve Force; Chief of Naval Research; Commander, Naval Oceanography Command; heads of Department of the Navy Staff Offices, Boards, and Councils; Flag Officers and General Officers. NJAG and his Deputy, and OGC and his Deputies are excluded from this grant of authorization. While NJAG and OGC are not denial authorities, they are authorized to further delegate the authority conferred here to other senior officers/officials within NJAG and OGC.

(2) *For the shore establishment.*(i) All officers authorized under Article 22, Uniform Code of Military Justice (UCMJ) or designated in section 0120, Manual of the Judge Advocate General (JAGINST 5800.7C)⁵, to convene general courts-martial.

(ii) Commander, Naval Investigative Service Command.

⁵Copies available from the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(iii) Deputy Commander, Naval Legal Service Command.

(3) *In the Operating Forces.* All officers authorized by Article 22, Uniform Code of Military Justice (UCMJ), or designated in section 0120, Manual of the Judge Advocate General (JAGINST 5800.7C), to convene general courts-martial.

(f) *Review authority.* (1) The Assistant Secretary of the Navy (Manpower and Reserve Affairs), is the Secretary's designee, and shall act upon requests for administrative review of initial denials of requests for amendment of records related to fitness reports and performance evaluations of military personnel (see § 701.111(c)(3)).

(2) The Judge Advocate General and General Counsel, as the Secretary's designees, shall act upon requests for administrative review of initial denials of records for notification, access, or amendment of records, as set forth in § 701.111(c)(2) and (4).

(3) The authority of the Secretary of the Navy (SECNAV), as the head of an agency, to request records subject to the Privacy Act from an agency external to the Department of Defense for civil or criminal law enforcement purposes, under subsection (b)(7) of 5 U.S.C. 552a, is delegated to the Commandant of the Marine Corps, the Director of Naval Intelligence, the Judge Advocate General, and the General Counsel.

(g) *Systems manager.* Systems managers, as designated in Department of the Navy's compilation of systems notices (periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211⁶, "Current Privacy Act Issuances") shall:

(1) Ensure the system has been published in the FEDERAL REGISTER and that any additions or significant changes are submitted to CNO (N09B30) for approval and publication. The systems of records should be maintained in accordance with the systems notices as published in the periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances."

(2) Maintain accountability records of disclosures.

⁶See footnote 3 to § 701.101.

(h) *Department of the Navy employees.* Each employee of the Department of the Navy has certain responsibilities for safeguarding the rights of others. These include:

(1) Not disclosing any information contained in a system of records by any means of communication to any person or agency, except as authorized by this subpart and subpart G of this part.

(2) Not maintaining unpublished official files which would fall under the provisions of 5 U.S.C. 552a.

(3) Safeguarding the privacy of individuals and confidentiality of personal information contained in a system of records.

§ 701.105 Systems of records.

To be subject to this subpart and subpart G of this part, a "system of records" must consist of "records" that are retrieved by the name, or some other personal identifier, of an individual and be under the control of Department of the Navy.

(a) *Retrieval practices.* (1) Records in a group of records that are not retrieved by personal identifiers are not covered by this subpart and subpart G of this part, even if the records contain information about individuals and are under the control of Department of the Navy. The records must be retrieved by personal identifiers to become a system of records.

(2) If records previously not retrieved by personal identifiers are rearranged so they are retrieved by personal identifiers, a new system notice must be submitted in accordance with § 701.107.

(3) If records in a system of records are rearranged so retrieval is no longer by personal identifiers, the records are no longer subject to this subpart and subpart G of this part and the records system notice should be deleted in accordance with § 701.107.

(b) *Recordkeeping standards.* A record maintained in a system of records subject to this subpart and subpart G of this part must meet the following criteria:

(1) Be accurate. All information in the record must be factually correct.

(2) Be relevant. All information contained in the record must be related to the individual who is the record subject

and also must be related to a lawful purpose or mission of the Department of the Navy activity maintaining the record.

(3) Be timely. All information in the record must be reviewed periodically to ensure that it has not changed due to time or later events.

(4) Be complete. It must be able to stand alone in accomplishing the purpose for which it is maintained.

(5) Be necessary. All information in the record must be needed to accomplish a Department of the Navy mission or purpose established by Federal Law or E.O. of the President.

(c) *Authority to establish systems of records.* Identify the specific Federal statute or E.O. of the President that authorizes maintaining each system of records. When a naval activity uses its "internal housekeeping" statute, i.e., 5 U.S.C. 301, Departmental Regulations, the naval instruction that implements the statute should also be identified. A statute or E.O. authorizing a system of records does not negate the responsibility to ensure the information in the system of records is relevant and necessary.

(d) *Exercise of First Amendment rights.*

(1) Do not maintain any records describing how an individual exercises rights guaranteed by the First Amendment of the U.S. Constitution unless expressly authorized by Federal law; the individual; or pertinent to and within the scope of an authorized law enforcement activity.

(2) First amendment rights include, but are not limited to, freedom of religion, freedom of political beliefs, freedom of speech, freedom of the press, the right to assemble, and the right to petition.

(e) *System manager's evaluations and reviews.* (1) Evaluate each new system of records. Before establishing a system of records, evaluate the information to be included and consider the following:

(i) The relationship of each item of information to be collected and retained to the purpose for which the system is maintained (all information must be relevant to the purpose);

(ii) The specific impact on the purpose or mission if each category of information is not collected (all informa-

tion must be necessary to accomplish a lawful purpose or mission.);

(iii) The ability to meet the informational needs without using personal identifiers (will anonymous statistical records meet the needs?);

(iv) The length of time each item of information must be kept;

(v) The methods of disposal;

(vi) The cost of maintaining the information; and

(vii) Whether a system already exists that serves the purpose of the new system.

(2) Evaluate and review all existing systems of records.

(i) When an alteration or amendment of an existing system is prepared pursuant to § 701.107(b) and (c), do the evaluation described in § 701.105(e).

(ii) Conduct the following reviews annually and be prepared to report, in accordance with § 701.104(c)(8), the results and corrective actions taken to resolve problems uncovered.

(A) Training practices to ensure all personnel are familiar with the requirements of 5 U.S.C. 552a, and DoD Directive 5400.11, "DoD Privacy Program", this subpart and subpart G of this part, and any special needs their specific jobs entail.

(B) Recordkeeping and disposal practices to ensure compliance with this subpart and subpart G of this part.

(C) Ongoing computer matching programs in which records from the system have been matched with non-DoD records to ensure that the requirements of § 701.115 have been met.

(D) Actions of Department of the Navy personnel that resulted in either Department of the Navy being found civilly liable or a person being found criminally liable under 5 U.S.C. 552a, to determine the extent of the problem and find the most effective way of preventing the problem from occurring in the future.

(E) Each system of records notice to ensure it accurately describes the system. Where major changes are needed, alter the system notice in accordance with § 701.107(b). If minor changes are needed, amend the system notice pursuant to § 701.107(c).

(iii) Every even-numbered year, review a random sample of Department of the Navy contracts that provide for

the operation of a system of records to accomplish a Department of the Navy function, to ensure the wording of each contract complies with the provisions of 5 U.S.C. 552a and § 701.105(h).

(iv) Every three years, beginning in 1992, review the routine use disclosures associated with each system of records to ensure the recipient's use of the records continues to be compatible with the purpose for which the information was originally collected.

(v) Every three years, beginning in 1993, review each system of records for which exemption rules have been established to determine whether each exemption is still needed.

(vi) When directed, send the reports through proper channels to the CNO (N09B30).

(f) *Discontinued information requirements.* (1) Immediately stop collecting any category or item of information about individuals that is no longer justified, and when feasible, remove the information from existing records.

(2) Do not destroy records that must be kept in accordance with retention and disposal requirements established under SECNAVINST 5212.5⁷, "Disposal of Navy and Marine Corps Records."

(g) *Review records before disclosing outside the Federal government.* Before disclosing a record from a system of records to anyone outside the Federal government, take reasonable steps to ensure the record which is being disclosed is accurate, relevant, timely, and complete for the purposes it is being maintained.

(h) *Federal government contractors—(1) Applicability to Federal government contractors.* (i) When a naval activity contracts for the operation of a system of records to accomplish its function, the activity must ensure compliance with this subpart and subpart G of this part and 5 U.S.C. 552a. For the purposes of the criminal penalties described in 5 U.S.C. 552a, the contractor and its employees shall be considered employees of the agency during the performance of the contract.

(ii) Consistent with Parts 24 and 52 of the Federal Acquisition Regulation

(FAR), contracts for the operation of a system of records shall identify specifically the record system and the work to be performed, and shall include in the solicitations and resulting contract the terms as prescribed by the FAR.

(iii) If the contractor must use records that are subject to this subpart and subpart G of this part to perform any part of a contract, the contractor activities are subject to this subpart and subpart G of this part.

(iv) This subpart and subpart G of this part do not apply to records of a contractor that are:

(A) Established and maintained solely to assist the contractor in making internal contractor management decisions, such as records maintained by the contractor for use in managing the contract;

(B) Maintained as internal contractor employee records, even when used in conjunction with providing goods or services to the naval activity;

(C) Maintained as training records by an educational organization contracted by a naval activity to provide training when the records of the contract students are similar to and commingled with training records of other students, such as admission forms, transcripts, and academic counseling and similar records; or

(D) Maintained by a consumer reporting agency to which records have been disclosed under contract in accordance with 31 U.S.C. 952d.

(v) For contracting that is subject to this subpart and subpart G of this part, naval activities shall publish instructions that:

(A) Furnish Privacy Act guidance to personnel who solicit, award, or administer Government contracts;

(B) Inform prospective contractors of their responsibilities under this subpart and subpart G of this part and the Department of the Navy Privacy Program;

(C) Establish an internal system for reviewing contractor's performance for compliance with the Privacy Act; and

(D) Provide for the biennial review of a random sample of contracts that are subject to this subpart and subpart G of this part.

(2) *Contracting procedures.* The Defense Acquisition Regulatory (DAR)

⁷Copies available from OPNAV/SECNAV Directives Control Office, Washington Navy Yard, Building 200, Washington, DC 20350-2000.

Council, which oversees the implementation of the FAR within the Department of Defense, is responsible for developing the specific policies and procedures for soliciting, awarding, and administering contracts that are subject to this subpart and subpart G of this part and 5 U.S.C. 552a.

(3) *Contractor compliance.* Naval activities shall establish contract surveillance programs to ensure contractors comply with the procedures established by the DAR Council under the preceding subparagraph.

(4) *Disclosing records to contractors.* Disclosing records to a contractor for use in performing a contract let by a naval activity is considered a disclosure within Department of the Navy. The contractor is considered the agent of Department of the Navy when receiving and maintaining the records for that activity.

§701.106 Safeguarding records in systems of records.

Establish appropriate administrative, technical, and physical safeguards to ensure the records in every system of records are protected from unauthorized alteration, destruction, or disclosure. Protect the records from reasonably anticipated threats or hazards that could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

(a) *Minimum standards.* (1) Conduct risk analysis and management planning for each system of records. Consider sensitivity and use of the records, present and projected threats and vulnerabilities, and present and projected cost-effectiveness of safeguards. The risk analysis may vary from an informal review of a small, relatively insensitive system to a formal, fully quantified risk analysis of a large, complex, and highly sensitive system.

(2) Train all personnel operating a system of records or using records from a system of records in proper record security procedures.

(3) Label information exempt from disclosure under this subpart and subpart G of this part to reflect their sensitivity, such as "FOR OFFICIAL USE ONLY," "PRIVACY ACT SENSITIVE: DISCLOSE ON A NEED-TO-KNOW

BASIS ONLY," or some other statement that alerts individuals of the sensitivity to the records.

(4) Administer special administrative, physical, and technical safeguards to protect records processed or stored in an automated data processing or word processing system to protect them from threats unique to those environments.

(b) *Records disposal.* (1) Dispose of records from systems of records so as to prevent inadvertent disclosure. Disposal methods are considered adequate if the records are rendered unrecognizable or beyond reconstruction (i.e., such as tearing, burning, melting, chemical decomposition, burying, pulping, pulverizing, shredding, or mutilation). Magnetic media may be cleared by completely erasing, overwriting, or degaussing the tape.

(2) The transfer of large volumes of records (e.g., printouts and computer cards) in bulk to a disposal activity such as a Defense Reutilization and Marketing Office for authorized disposal is not a disclosure of records, if the volume of records, coding of the information, or some other factor render it impossible to recognize any personal information about a specific individual.

(3) When disposing or destroying large quantities of records from a system of records, care must be taken to ensure that the bulk of the records is maintained to prevent easy identification of specific records. If such bulk is maintained, no special procedures are required. If bulk is not maintained, or if the form of the records makes individually identifiable information easily discernable, dispose of the records in accordance with § 701.106(b)(1).

§701.107 Criteria for creating, altering, amending and deleting Privacy Act systems of records.

(a) *Criteria for a new system of records.* A new system of records is one for which no existing system notice has been published in the FEDERAL REGISTER. If a notice for a system of records has been canceled or deleted, and it is determined that it should be reinstated or reused, a new system notice must be published in the FEDERAL REGISTER. Advance public notice must

be given before a naval activity may begin to collect information for or use a new system of records. The following procedures apply:

(1) Describe in the record system notice the contents of the record system and the purposes and routine uses for which the information will be used and disclosed.

(2) The public shall be given 30 days to comment on any proposed routine uses before the routine uses are implemented.

(3) The notice shall contain the date the system of records will become effective.

(b) *Criteria for an alteration to a system of records notice.* A system is considered altered when any one of the following actions occur or is proposed:

(1) A significant increase or change in the number or types of individuals about whom records are maintained. For example, a decision to expand a system of records that originally covered personnel assigned to only one naval activity to cover personnel at several installations would constitute an altered system. An increase or decrease in the number of individuals covered due to normal growth or decrease is not an alteration.

(2) A change that expands the types or categories of information maintained. For example, a personnel file that has been expanded to include medical records would be an alteration.

(3) A change that alters the purpose for which the information is used. In order to be an alteration, the change must be one that is not reasonably inferred from any of the existing purposes.

(4) A change to equipment configuration (either hardware or software) that creates substantially greater use of records in the system. For example, placing interactive computer terminals at regional offices when the system was formerly used only at the headquarters would be an alteration.

(5) A change in the manner in which records are organized or in the method by which records are retrieved.

(6) Combining record systems due to a reorganization within Department of the Navy.

(7) Retrieving by Social Security Numbers (SSNs), records that pre-

viously were retrieved only by names would be an alteration if the present notice failed to indicate retrieval by SSNs. An altered system of records must be published in the FEDERAL REGISTER. Submission for an alteration must contain a narrative statement, the specific changes altering the system, and the system of records notice.

(c) *Criteria for amending a systems of records notice.* Minor changes to published system of records notices are considered amendments. All amendments should be forwarded to CNO (N09B30) for publication in the FEDERAL REGISTER. When submitting an amendment to a system of records notice, the naval activity must include a description of the specific changes proposed and the system of records notice.

(d) *Criteria for deleting a system of records notice.* When a system of records is discontinued, incorporated into another system, or determined to be no longer subject to this subpart and subpart G of this part, a deletion notice must be published in the FEDERAL REGISTER. The deletion notice shall include the system identification number, system name, and the reason for deleting it. If a system is deleted through incorporation into or merger with another system, identify the successor system in the deletion notice.

§ 701.108 Collecting information about individuals.

(a) *Collecting directly from the individual.* To the greatest extent practicable, collect information for systems of records directly from the individual to whom the record pertains if the record may be used to make an adverse determination about the individual's rights, benefits, or privileges under the Federal programs.

(b) *Collecting information about individuals from third persons.* It might not always be practical to collect all information about an individual directly from that person, such as verifying information through other sources for security or employment suitability determinations; seeking other opinions, such as a supervisor's comments on past performance or other evaluations; obtaining the necessary information directly from the individual would be exceptionally difficult or would result

in unreasonable costs or delays; or, the individual requests or consents to contacting another person to obtain the information.

(c) *Soliciting the social security number (SSN).* (1) It is unlawful for any Federal, State, or local government agency to deny an individual a right, benefit, or privilege provided by law because the individual refuses to provide his or her SSN. However, this prohibition does not apply if a Federal law requires that the SSN be provided, or the SSN is required by a law or regulation adopted before January 1, 1975, to verify the individual's identity for a system of records established and in use before that date.

(2) Before requesting an individual to provide the SSN, the individual must be advised whether providing the SSN is mandatory or voluntary; by what law or other authority the SSN is solicited; and what uses will be made of the SSN.

(3) The preceding advice relates only to the SSN. If other information about the individual is solicited for a system of records, a Privacy Act statement (PAS) also must be provided to him/her.

(4) The notice published in the FEDERAL REGISTER for each system of records containing SSNs solicited from individuals must indicate the authority for soliciting the SSNs and whether it is mandatory for the individuals to provide their SSNs. E.O. 9397 requires federal agencies to use SSNs as numerical identifiers for individuals in most federal records systems, however, it does not make it mandatory for individuals to provide their SSNs.

(5) When entering military service or civilian employment with the Department of the Navy, individuals must provide their SSNs. This is then the individual's numerical identifier and is used to establish personnel, financial, medical, and other official records (as authorized by E.O. 9397). The individuals must be given the notification described above. Once the individual has provided his or her SSN to establish the records, a notification is not required when the SSN is requested only for identification or to locate the records.

(6) The Federal Personnel Manual⁸ must be consulted when soliciting SSNs for use in systems of records maintained by the Office of Personnel Management.

(7) A Department of the Navy activity may request an individual's SSN even though it is not required by Federal statute, or is not for a system of records in existence and operating prior to January 1, 1975. However, the separate Privacy Act Statement for the SSN, alone, or a merged Privacy Act Statement covering both the SSN and other items of personal information, must make clear that disclosure of the number is voluntary. If the individual refuses to disclose his or her SSN, the activity must be prepared to identify the individual by alternate means.

(d) *Contents of Privacy Act Statement.*

(1) When an individual is requested to furnish information about himself/herself for a system of records, a Privacy Act Statement must be provided to the individual, regardless of the method used to collect the information (i.e., forms, personal or telephonic interview, etc). If the information requested will not be included in a system of records, a Privacy Act Statement is not required.

(2) The Privacy Act Statement shall include the following:

(i) The Federal law or E.O. that authorizes collecting the information (i.e., E.O. 9397 authorizes collection of SSNs);

(ii) Whether or not it is mandatory for the individual to provide the requested information (It is only mandatory when a Federal law or E.O. of the President specifically imposes a requirement to furnish the information and provides a penalty for failure to do so. If furnishing information is a condition for granting a benefit or privilege voluntarily sought by the individual, it is voluntary for the individual to give the information.);

(iii) The principle purposes for collecting the information;

(iv) The routine uses that will be made of the information (i.e., to whom

⁸Copies available from the Office of Personnel Management, 1900 E Street, Washington, DC 20415.

and why it will be disclosed outside the Department of Defense); and

(v) The possible effects on the individual if the requested information is not provided.

(3) The Privacy Act Statement must appear on the form used to collect the information or on a separate form that can be retained by the individual collecting the information. If the information is collected by means other than a form completed by the individual, i.e., solicited over the telephone, the Privacy Act Statement should be read to the individual and if requested by the individual, a copy sent to him/her. There is no requirement that the individual sign the Privacy Act Statement.

(e) *Format for Privacy Act Statement.* When forms are used to collect information about individuals for a system of records, the Privacy Act Statement shall appear as follows (listed in the order of preference):

(1) Immediately below the title of the form,

(2) Elsewhere on the front page of the form (clearly indicating it is the Privacy Act Statement),

(3) On the back of the form with a notation of its location below the title of the form, or

(4) On a separate form which the individual may keep.

§ 701.109 Access to records.

(a) *Individual access to records—(1) Right of access.* Only individuals who are subjects of records maintained in systems of records and by whose personal identifiers the records are retrieved have the right of individual access under this subpart and subpart G of this part, unless they provide written authorization for their representative to act on their behalf. Legal guardians or parents acting on behalf of a minor child also have the right of individual access under this subpart and subpart G of this part.

(2) *Notification of record's existence.* Each naval activity shall establish procedures for notifying an individual, in response to his or her request, if a system of records identified by him/her contains a record pertaining to the individual.

(3) *Individual request for access.* Individuals shall address requests for ac-

cess to records in systems of records to the system manager or the office designated in the Department of the Navy compilation of system notices (periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances").

(4) *Verifying identity.* (i) An individual shall provide reasonable verification of identity before obtaining access to records.

(ii) When requesting records in writing, naval activities may not insist that a requester submit a notarized signature. The courts have ruled that an alternative method of verifying identity must be established for individuals who do not have access to notary services. This alternative permits requesters to provide an unsworn declaration that states "I declare under perjury or penalty under the laws of the United States of American that the foregoing is true and correct."

(iii) When an individual seeks access in person, identification can be verified by documents normally carried by the individual (i.e., identification card, driver's license, or other license, permit or pass normally used for identification purposes).

(iv) When access is requested other than in writing, identity may be verified by the individual's providing minimum identifying data such as full name, date and place of birth, or other information necessary to locate the record sought. If the information sought is sensitive, additional identifying data may be required. Telephonic requests should not be honored.

(v) Allow an individual to be accompanied by a person of his or her choice when viewing the record; however, require the individual to provide written authorization to have the record discussed in front of the other person.

(vi) Do not deny access to an individual who is the subject of the record solely for refusing to divulge his or her SSN, unless it is the only means of retrieving the record or verifying identity.

(vii) Do not require the individual to explain why he or she is seeking access to a record under this subpart and subpart G of this part.

(viii) Only a designated denial authority may deny access. The denial

must be in writing and contain the information required by § 701.109(d).

(5) *Blanket requests not honored.* Do not honor requests from individuals for notification and/or access concerning all Department of the Navy systems of records. In these instances, notify the individual that requests for notification and/or access must be directed to the appropriate system manager for the particular record system being requested, as indicated in the periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances"; and the request must either designate the particular system of records to be searched, or provide sufficient information for the system manager to identify the appropriate system. Also, provide the individual with any other information needed for obtaining consideration of his or her request.

(6) *Granting individual access to records.* (i) Grant the individual access to the original record (or exact copy) without any changes or deletions, other than those made in accordance with § 701.113.

(ii) Grant the individual's request for an exact copy of the record, upon the signed authorization of the individual, and provide a copy to anyone designated by the individual. In either case, the copying fees may be assessed to the individual pursuant to § 701.109(b).

(iii) If requested, explain any record or portion of a record that is not understood, as well as any changes or deletions.

(7) *Illegible or incomplete records.* Do not deny an individual access solely because the physical condition or format of the record does not make it readily available (i.e., when the record is in a deteriorated state or on magnetic tape). Either prepare an extract or re-copy the document exactly.

(8) *Access by parents and legal guardians.* (i) The parent of any minor, or the legal guardian of any individual declared by a court of competent jurisdiction to be incompetent due to physical or mental incapacity or age, may obtain access to the record of the minor or incompetent individual if the parent or legal guardian is acting on behalf or for the benefit of the minor or

incompetent. However, with respect to access by parents and legal guardians to medical records and medical determinations about minors, use the following procedures:

(A) In the United States, the laws of the state where the records are located might afford special protection to certain medical records (i.e., drug and alcohol abuse treatment, and psychiatric records). The state statutes might apply even if the records are maintained by a naval medical facility.

(B) For installations located outside the U.S., the parent or legal guardian of a minor shall be denied access if all four of the following conditions are met:

(1) The minor at the time of the treatment or consultation was 15, 16, or 17 years old;

(2) The treatment or consultation was within a program authorized by law or regulation to provide confidentiality to the minor;

(3) The minor indicated a desire that the treatment or consultation record be handled in confidence and not disclosed to a parent or guardian; and

(4) The parent or legal guardian does not have the written authorization of the minor or a valid court order granting access.

(ii) A minor or incompetent has the same right of access as any other individual under this subpart and subpart G of this part. The right of access of the parent or legal guardian is in addition to that of the minor or incompetent.

(9) *Access to information compiled in reasonable anticipation of a civil proceeding.* (i) An individual is not entitled under this subpart and subpart G of this part to access information compiled in reasonable anticipation of a civil action or proceeding.

(ii) The term "civil action or proceeding" includes quasi-judicial and pre-trial judicial proceedings, as well as formal litigation.

(iii) Section 701.109(9)(i) and (ii) do not prohibit access to records compiled or used for purposes other than litigation, nor prohibit access to systems of records solely because they are frequently subject to litigation. The information must have been compiled for the primary purpose of litigation.

(10) *Personal notes or records not under the control of the Department of the Navy.* (i) Certain documents under the control of a Department of the Navy employee and used to assist him/her in performing official functions are not considered Department of the Navy records within the meaning of this subpart and subpart G of this part. These documents are not systems of records that are subject to this subpart and subpart G of this part, if they are:

- (A) Maintained and discarded solely at the discretion of the author;
- (B) Created only for the author's personal convenience;
- (C) Not the result of official direction or encouragement, whether oral or written; and
- (D) Not shown to other persons for any reason or filed in agency files.

(11) *Relationship between the Privacy Act and FOIA.* In some instances, individuals requesting access to records pertaining to themselves may not know which Act to cite as the appropriate statutory authority. The following guidelines are to ensure that the individuals receive the greatest degree of access under both Acts:

(i) Access requests that specifically state or reasonably imply that they are made under 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act of 1986, are processed under Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program."

(ii) Access requests that specifically state or reasonably imply that they are made under 5 U.S.C. 552a are processed under this subpart and subpart G of this part.

(iii) Access requests that cite both 5 U.S.C. 552a, as amended by the Computer Matching Act of 1988 and 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act are processed under the Act that provides the greater degree of access. Inform the requester which instruction was used in granting or denying access.

(iv) Do not penalize the individual access to his or her records otherwise releasable under 5 U.S.C. 552a and periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances", simply because he or

she failed to cite the appropriate statute or instruction.

(12) *Time Limits.* Acknowledge requests for access made under Privacy Act or this subpart and subpart G of this part within 10 working days after receipt, and advise the requester of your decision to grant/deny access within 30 working days.

(b) *Reproduction fees.* Normally, only one copy of any record or document will be provided. Checks or money orders for fees should be made payable to the Treasurer of the United States and deposited to the miscellaneous receipts of the treasury account maintained at the finance office servicing the activity.

(1) Fee schedules shall include only the direct cost of reproduction and shall not include costs of:

- (i) Time or effort devoted to searching for or reviewing the record by naval personnel;
- (ii) Fees not associated with the actual cost of reproduction;
- (iii) Producing a copy when it must be provided to the individual without cost under another regulation, directive, or law;
- (iv) Normal postage;
- (v) Transportation of records or personnel; or
- (vi) Producing a copy when the individual has requested only to review the record and has not requested a copy to keep, and the only means of allowing review is to make a copy (e.g., the record is stored in a computer and a copy must be printed to provide individual access, or the naval activity does not wish to surrender temporarily the original record for the individual to review).

(2) *Fee schedules.*

- (i) Office copy (per page).....\$.10
- (ii) Microfiche (per fiche).....\$.25

(3) *Fee waivers.* Waive fees automatically if the direct cost of reproduction is less than \$15, unless the individual is seeking an obvious extension or duplication of a previous request for which he or she was granted a waiver. Decisions to waive or reduce fees that exceed \$15 are made on a case-by-case basis.

(c) *Denying individual access.* (1) Deny the record subject access to requested

record only if it was compiled in reasonable anticipation of a civil action or proceeding or is in a system of records that has been exempt from the access provisions of § 701.113.

(2) Deny the individual access only to those portions of the record for which the denial will serve a legitimate government purpose. An individual may be refused access for failure to comply with established procedural requirements, but must be told the specific reason for the refusal and the proper access procedures.

(3) Deny the individual access to his or her medical and psychological records if it is determined that access could have an adverse effect on the mental or physical health of the individual. This determination normally should be made in consultation with a medical practitioner. If it is medically indicated that access could have an adverse mental or physical effect on the individual, provide the record to a medical practitioner named by the individual, along with an explanation of why access without medical supervision could be harmful to the individual. In any case, do not require the named medical practitioner to request the record for the individual. If, however, the individual refuses or fails to designate a medical practitioner, access shall be refused. The refusal is not considered a denial for reporting purposes under the Privacy Act.

(d) *Notifying the individual.* Written denial of access must be given to the individual. The denial letter shall include:

- (1) The name, title, and signature of a designated denial authority;
- (2) The date of the denial;
- (3) The specific reason for the denial, citing the appropriate subsections of 5 U.S.C. 552a or this subpart and subpart G of this part authorizing the denial;
- (4) The individual's right to appeal the denial within 60 calendar days of the date the notice is mailed; and
- (5) The title and address of the review authority.

§ 701.110 Amendment of records.

(a) *Individual review and amendment.* Encourage individuals to review periodically, the information maintained about them in systems of records, and

to avail themselves of the amendment procedures established by this subpart and subpart G of this part.

(1) *Right to amend.* An individual may request to amend any record retrieved by his or her personal identifier from a system of records, unless the system has been exempt from the amendment procedures under this subpart. Amendments under this subpart and subpart G of this part are limited to correcting factual matters, not matters of opinion (i.e., information contained in evaluations of promotion potential or performance appraisals). When records sought to be amended are covered by another issuance, the administrative procedures under that issuance must be exhausted before using the Privacy Act. In other words, the Privacy Act may not be used to avoid the administrative procedures required by the issuance actually covering the records in question.

(2) *In writing.* Amendment requests shall be in writing, except for routine administrative changes, such as change of address.

(3) *Content of amendment request.* An amendment request must include a description of the information to be amended; the reason for the amendment; the type of amendment action sought (i.e., deletion, correction, or addition); and copies of available documentary evidence supporting the request.

(b) *Burden of proof.* The individual must provide adequate support for the request.

(c) *Verifying identity.* The individual may be required to provide identification to prevent the inadvertent or intentional amendment of another's record. Use the verification guidelines provided in § 701.109(a)(4).

(d) *Limits on amending judicial and quasi-judicial evidence and findings.* This subpart and subpart G of this part do not permit the alteration of evidence presented in the course of judicial or quasi-judicial proceedings. Amendments to such records must be made in accordance with procedures established for such proceedings. This subpart and subpart G of this part do not permit a collateral attack on a judicial or quasi-judicial finding; however, this subpart and subpart G of this part may be used

to challenge the accuracy of recording the finding in a system of records.

(e) *Standards for amendment request determinations.* The record which the individual requests to be amended must meet the recordkeeping standards established in § 701.105. The record must be accurate, relevant, timely, complete, and necessary. If the record in its present state does not meet each of the criteria, grant the amendment request to the extent necessary to meet them.

(f) *Time limits.* Within 10 working days of receiving an amendment request, the systems manager shall provide the individual a written acknowledgement of the request. If action on the amendment request is completed within the 10 working days and the individual is so informed, no separate acknowledgment is necessary. The acknowledgment must clearly identify the request and advise the individual when to expect notification of the completed action. Only under exceptional circumstances should more than 30 working days be required to complete the action on an amendment request.

(g) *Granting an amendment request in whole or in part—(1) Notify the requester.* To the extent the amendment request is granted, the systems manager shall notify the individual and make the appropriate amendment.

(2) *Notify previous recipients.* Notify all previous recipients of the information (as reflected in the disclosure accounting record) that the amendment has been made and provide each a copy of the amended record. Recipients who are known to be no longer retaining the record need not be advised of the amendment. If it is known that other naval activities, DoD components, or Federal agencies have been provided the information that now requires amendment, or if the individual requests that these agencies be notified, provide the notification of amendment even if those activities or agencies are not listed on the disclosure accounting form.

(h) *Denying an amendment request in whole or in part.* If the amendment request is denied in whole or in part, promptly notify the individual in writing. Include in the notification to the individual the following:

(1) Those sections of 5 U.S.C. 552a or this subpart and subpart G of this part upon which the denial is based;

(2) His or her right to appeal to the head of the activity for an independent review of the initial denial;

(3) The procedures for requesting an appeal, including the title and address of the official to whom the appeal should be sent; and

(4) Where the individual can receive assistance in filing the appeal.

(i) *Requests for amending OPM records.* The records in an OPM government-wide system of records are only temporarily in the custody of naval activities. Requests for amendment of these records must be processed in accordance with OPM Regulations and the Federal Personnel Manual. The denial authority may deny a request, but all denials are subject to review by the Assistant Director for Workforce Information, Personnel Systems Oversight Group, Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415.

(j) *Individual's statement of disagreement.* (1) If the review authority refuses to amend the record as requested, the individual may submit a concise statement of disagreement listing the reasons for disagreeing with the refusal to amend.

(2) If possible, incorporate the statement of disagreement into the record. If that is not possible, annotate the record to reflect that the statement was filed and maintain the statement so that it can be readily obtained when the disputed information is used or disclosed.

(3) Furnish copies of the statement of disagreement to all individuals listed on the disclosure accounting form (except those known to be no longer retaining the record), as well as to all other known holders of copies of the record.

(4) Whenever the disputed information is disclosed for any purpose, ensure that the statement of disagreement also is used or disclosed.

(k) *Department of the Navy statement of reasons.* (1) If the individual files a statement of disagreement, the naval activity may file a statement of reasons containing a concise summary of

the activity's reasons for denying the amendment request.

(2) The statement of reasons shall contain only those reasons given to the individual by the appellate official and shall not contain any comments on the individual's statement of disagreement.

(3) At the discretion of the naval activity, the statement of reasons may be disclosed to those individuals, activities, and agencies that receive the statement of disagreement.

§ 701.111 Privacy Act appeals.

(a) *How to file an appeal.* The following guidelines shall be followed by individuals wishing to appeal a denial of notification, access, or amendment of records.

(1) The appeal must be received by the cognizant review authority (i.e., ASN (M&RA), NJAG, OGC, or OPM) within 60 calendar days of the date of the response.

(2) The appeal must be in writing and requesters should provide a copy of the denial letter and a statement of their reasons for seeking review.

(b) *Time of receipt.* The time limits for responding to an appeal commence when the appeal reaches the office of the review authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper review authority.

(c) *Review authorities.* ASN (M&RA), NJAG, and OGC are authorized to adjudicate appeals made to SECNAV. NJAG and OGC are further authorized to delegate this authority to a designated Assistant NJAG and the Principal Deputy General or Deputy General Counsel, respectively, under such terms and conditions as they deem appropriate.

(1) If the record is from a civilian Official Personnel Folder or is contained on any other OPM forms, send the appeal to the Assistant Director for Workforce Information, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415. Records in all systems of records maintained in accordance with the OPM government-wide systems notices are only in the temporary custody of the Department of the Navy.

(2) If the record pertains to the employment of a present or former Navy and Marine Corps civilian employee, such as Navy or Marine Corps civilian personnel records or an employee's grievance or appeal file, to the General Counsel, Navy Department, Washington, DC 20360-5110.

(3) If the record pertains to a present or former military member's fitness reports or performance evaluations to the Assistant Secretary of the Navy (Manpower and Reserve Affairs), Navy Department, Washington, DC 20350-1000.

(4) All other records dealing with present or former military members to the Judge Advocate General, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(d) *Appeal procedures.* (1) If the appeal is granted, the review authority shall advise the individual that his or her appeal has been granted and provide access to the record being sought.

(2) If the appeal is denied totally or in part, the appellate authority shall advise the reason(s) for denying the appeal, citing the appropriate subsections of 5 U.S.C. 552a or this subpart and subpart G of this part that apply; the date of the appeal determination; the name, title, and signature of the appellate authority; and a statement informing the requester of his or her right to seek judicial relief in the Federal District Court.

(e) *Final action, time limits and documentation.* (1) The written appeal notification granting or denying access is the final naval activity action on the initial request for access.

(2) All appeals shall be processed within 30 working days of receipt, unless the appellate authority finds that an adequate review cannot be completed within that period. If additional time is needed, notify the applicant in writing, explaining the reason for the delay and when the appeal will be completed.

(f) *Denial of appeal by activity's failure to act.* An individual may consider his or her appeal denied if the appellate authority fails to:

(1) Take final action on the appeal within 30 working days of receipt when no extension of time notice was given; or

(2) Take final action within the period established by the notice to the appellate authority of the need for an extension of time to complete action on the appeal.

§ 701.112 Disclosure of records.

(a) *Conditions of disclosure.* (1) 5 U.S.C. 552a prohibits an agency from disclosing any record contained in a system of records to any person or agency, except when the record subject gives written consent for the disclosure or when one of the 12 conditions listed below in this subsection applies.

(2) Except for disclosures made under 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act of 1986 and Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program," before disclosing any record from a system of records to any recipient other than a Federal agency, make reasonable efforts to ensure the record is accurate, relevant, timely, and complete for Department of the Navy purposes. Records discovered to have been improperly filed in the system of records should be removed before disclosure.

(i) If validation cannot be obtained from the record itself, the naval activity may contact the record subject (if reasonably available) to verify the accuracy, timeliness, completeness, and relevancy of the information.

(ii) If validation cannot be obtained from the record and the record subject is not reasonably available, advise the recipient that the information is believed to be valid as of a specific date and reveal any factors bearing on the validity of the information.

(b) *Nonconsensual disclosures.* 5 U.S.C. 552a provides 12 instances when a record in a system of records may be disclosed without the written consent of the record subject:

(1) *Disclosures within the Department of Defense.* For purposes of disclosing records, the Department of Defense is considered a single agency; hence, a record may be disclosed to any officer or employee in the Department of Defense (including private contractor personnel who are engaged to perform services needed in connection with the operation of a system of records for a DoD component), who have a need for

the record in the performance of their duties, provided this use is compatible with the purpose for which the record is maintained. This provision is based on the "need to know" concept.

(i) For example, this may include disclosure to personnel managers, review boards, discipline officers, courts-martial personnel, medical officers, investigating officers, and representatives of the Judge Advocate General, Auditor General, Naval Inspector General, or the Naval Investigative Service, who require the information in order to discharge their official duties. Examples of personnel outside the Department of the Navy who may be included are: Personnel of the Joint Staff, Armed Forces Entrance and Examining Stations, Defense Investigative Service, or the other military departments, who require the information in order to discharge an official duty.

(ii) It may also include the transfer of records between naval components and non-DoD agencies in connection with the Personnel Exchange Program (PEP) and interagency support agreements. Disclosure accountings are not required for intra-agency disclosure and disclosures made in connection with interagency support agreements or the PEP. Although some disclosures authorized by this paragraph might also meet the criteria for disclosure under other exceptions specified in the following paragraphs of this section, they should be treated under this paragraph for disclosure accounting purposes.

(2) *Disclosures required by the FOIA.* (i) A record must be disclosed if required by 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act of 1986, which is implemented by Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program."

(ii) 5 U.S.C. 552 (1988) as amended by the Freedom of Information Reform Act of 1986 and Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program" require that records be made available to any person requesting them in writing, unless the record is exempt from disclosure under one of the nine FOIA exemptions. Therefore,

if a record is not exempt from disclosure, it must be provided to the requester.

(iii) Certain records, such as personnel, medical, and similar files, are exempt from disclosure under exemption (b)(6) of 5 U.S.C. 552 (1988) as amended by the Freedom of Information Act Reform Act of 1986. Under that exemption, disclosure of information pertaining to an individual can be denied only when the disclosure would be a clearly unwarranted invasion of personal privacy. The first step is to determine whether a viable personal privacy interest exists in these records involving an identifiable living person. The second step is to consider how disclosure would benefit the general public in light of the content and context of the information in question. The third step is to determine whether the identified public interests qualify for consideration. The fourth step is to balance the personal privacy interests against the qualifying public interest. Numerous factors must be considered such as: The nature of the information to be disclosed (i.e., Do individuals normally have an expectation of privacy in the type of information to be disclosed?); importance of the public interest served by the disclosure and probability of further disclosure which may result in an unwarranted invasion of privacy; relationship of the requester to the public interest being served; newsworthiness of the individual to whom the information pertains (i.e., high ranking officer, public figure); degree of sensitivity of the information from the standpoint of the individual or the individual's family, and its potential for being misused to the harm, embarrassment, or inconvenience of the individual or the individual's family; the passage of time since the event which is the topic of the record (i.e., to disclose that an individual has been arrested and is being held for trial by court-martial is normally permitted, while to disclose an arrest which did not result in conviction might not be permitted after the passage of time); and the degree to which the information is already in the public domain or is already known by the particular requester.

(iv) Records or information from investigatory records, including personnel security investigatory records, are exempt from disclosure under the broader standard of "an unwarranted invasion of personal privacy" found in exemption (b)(7)(C) of 5 U.S.C. 552. This broader standard applies only to records or information compiled for law enforcement purposes.

(v) A disclosure under 5 U.S.C. 552 about military members must be in accordance with Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program", but the following information normally may be disclosed from military personnel records (except for those personnel assigned to sensitive or routinely deployable units, or located in a foreign territory), without a clearly unwarranted invasion of personal privacy: Full name, rank, date of rank, base pay, past duty stations, present duty station and future duty station (if finalized), unless the stations have been determined by the Department of the Navy to be sensitive, routinely deployable, or located in a foreign territory, office or duty telephone number, source of commission, promotion sequence number, awards and decorations, attendance at professional military schools, and duty status at any given time.

(vi) The following information normally may be disclosed from civilian employee records about CONUS employees: Full name, present and past position titles and occupational series, present and past grades, present and past annual salary rates (including performance awards or bonuses, incentive awards, merit pay amount, Meritorious and Distinguished Executive Ranks, and allowances and differentials), past duty stations, present duty station and future duty station (if finalized), including room numbers, shop designations, or other identifying information regarding buildings or places of employment, unless the duty stations have been determined by the Department of the Navy to be sensitive, routinely deployable, or located in a foreign territory, position descriptions, identification of job elements, and those performance standards (but not actual performance appraisals) that

the disclosure of which would not interfere with law enforcement programs or severely inhibit Department of the Navy effectiveness.

(viii) Disclosure of home addresses and home telephone numbers normally is considered a clearly unwarranted invasion of personal privacy and is prohibited. However, they may be disclosed if the individual has consented to the disclosure; the disclosure is required by the FOIA; the disclosure is required by another law, such as 42 U.S.C. 653, which provides assistance to states in locating parents who have defaulted on child support payments, or the collection of alimony, and to state and local tax authorities for the purpose of enforcing tax laws. However, care must be taken prior to release to ensure that a written record is prepared to document the reasons for the release determination.

(A) When compiling home addresses and telephone numbers, the individual may be offered the option of authorizing disclosure of the information without further consent for specific purposes, such as locator services. In that case, the information may be disclosed for the stated purpose without further consent. If the information is to be disclosed for any other purpose, a signed consent permitting the additional disclosure must be obtained from the individual.

(B) Before listing home addresses and telephone numbers in Department of the Navy telephone directories, give the individual the opportunity to refuse such a listing. If the individual requests that the home address or telephone number not be listed in the directory, do not assess any additional fee associated with maintaining an unlisted number for government-owned telephone services.

(C) The sale or rental of lists of names and addresses is prohibited unless such action is specifically authorized by Federal law. This does not prohibit the disclosure of names and addresses made under Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program."

(D) In response to FOIA requests, information concerning special and general courts-martial results (e.g.,

records of trial) are releasable. However, information regarding summary courts-martial and non-judicial punishment are generally not releasable. The balancing of interests must be done. It is possible that in a particular case, information regarding non-judicial punishment should be disclosed pursuant to a FOIA request (i.e., the facts leading to a nonjudicial punishment are particularly newsworthy or the case involves a senior official abusing the public trust through office-related misconduct, such as embezzlement). Announcement of nonjudicial punishment dispositions under JAGMAN, subsection 0107, is a proper exercise of command authority and not a release of information under FOIA or this subpart and subpart G of this part. Exceptions to this policy must be coordinated with CNO (N09B30) or CMC (MI-3) prior to responding to requesters, including all requests for this type of information from members of Congress.

(3) *Disclosures for established routine uses.* (i) Records may be disclosed outside the Department of the Navy if the disclosure is for an established routine use.

(ii) A routine use shall:

(A) Be compatible with and related to the purpose for which the record was created;

(B) Identify the persons or organizations to whom the record may be disclosed;

(C) Identify specifically the uses for which the information may be employed by the receiving person or organization; and

(D) Have been published previously in the FEDERAL REGISTER.

(iii) A routine use shall be established for each user of the information outside the Department of the Navy who needs the information for an official purpose.

(iv) Routine uses may be established, discontinued, or amended without the consent of the individuals to whom the records pertain. However, new and amended routine uses must be published in the FEDERAL REGISTER at least 30 days before the information may be disclosed under their provisions.

(v) In addition to the routine uses established by the Department of the

Navy for each system of records, common "Blanket Routine Uses," applicable to all record systems maintained with the Department of the Navy, have been established. These "Blanket Routine Uses" are published at the beginning of the Department of the Navy's FEDERAL REGISTER compilation of record systems notices rather than at each system notice and are also reflected in periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances." Unless a system notice specifically excludes a system of records from a "Blanket Routine Use," all "Blanket Routine Uses" apply to that system.

(vi) If the recipient has not been identified in the FEDERAL REGISTER or if the recipient, though identified, intends to employ the information for a purpose not published in the FEDERAL REGISTER, the written consent of the individual is required before the disclosure can be made.

(4) *Disclosures to the Bureau of the Census.* Records may be disclosed to the Bureau of the Census for purposes of planning or carrying out a census, survey, or related activities authorized by 13 U.S.C. 8.

(5) *Disclosures for statistical research or reporting.* Records may be disclosed to a recipient for statistical research or reporting if:

(i) Prior to the disclosure, the recipient has provided adequate written assurance that the records shall be used solely for statistical research or reporting; and

(ii) The records are transferred in a form that does not identify individuals.

(6) *Disclosures to the National Archives and Records Administration.* (i) Records may be disclosed to the National Archives and Records Administration for evaluation to determine whether the records have sufficient historical or other value to warrant preservation by the Federal government. If preservation is warranted, the records will be retained by the National Archives and Record Administration, which becomes the official owner of the records.

(ii) Records may be disclosed to the National Archives and Records Administration to carry out records management inspections required by Federal law.

(iii) Records transferred to a Federal Records Center operated by the National Archives and Records Administration for storage are not within this category. Those records continue to be maintained and controlled by the transferring naval activity. The Federal Records Center is considered the agent of Department of the Navy and the disclosure is made under § 701.112(b)(1).

(7) *Disclosures when requested for law enforcement purposes.* (i) A record may be disclosed to another agency or an instrumentality of any governmental jurisdiction within or under the control of the U.S. for a civil or criminal law enforcement activity if:

(A) The civil or criminal law enforcement activity is authorized by law (federal, state or local); and

(B) The head of the agency (or his or her designee) has made a written request to the naval activity specifying the particular record or portion desired and the law enforcement purpose for which it is sought.

(ii) Blanket requests for any and all records pertaining to an individual shall not be honored. The requesting agency must specify each record or portion desired and how each relates to the authorized law enforcement activity.

(iii) If a naval activity discloses a record outside the Department of Defense for law enforcement purposes without the individual's consent and without an adequate written request, the disclosure must be under an established routine use, such as the "Blanket Routine Use" for law enforcement.

(iv) Disclosure to foreign law enforcement agencies is not governed by the provisions of 5 U.S.C. 552a and this paragraph, but may be made only under established "Blanket Routine Uses," routine uses published in the individual record system notice, or to other governing authority.

(8) *Disclosure to protect the health or safety of an individual.* Disclosure may be made under emergency conditions involving circumstances affecting the health and safety of an individual (i.e., when the time required to obtain the consent of the individual to whom the records pertain might result in a delay which could impair the health or safety

of a person) provided notification of the disclosure is sent to the record subject. Sending the notification to the last known address is sufficient. In instances where information is requested by telephone, an attempt will be made to verify the inquirer's and medical facility's identities and the caller's telephone number. The requested information, if then considered appropriate and of an emergency nature, may be provided by return call.

(9) *Disclosures to Congress.* (i) A record may be disclosed to either House of Congress at the request of either the Senate or House of Representatives as a whole.

(ii) A record also may be disclosed to any committee, subcommittee, or joint committee of Congress if the disclosure pertains to a matter within the legislative or investigative jurisdiction of the committee, subcommittee, or joint committee.

(iii) Disclosure may not be made to a Member of Congress requesting in his or her individual capacity. However, for Members of Congress making inquiries on behalf of individuals who are subjects of records, a "Blanket Routine Use" has been established to permit disclosures to individual Members of Congress.

(A) When responding to a congressional inquiry made on behalf of a constituent by whose identifier the record is retrieved, there is no need to verify that the individual has authorized the disclosure to the Member of Congress.

(B) The oral or written statement of a Congressional staff member is sufficient to establish that a request has been received from the individual to whom the record pertains.

(C) If the constituent inquiry is made on behalf of an individual other than the record subject, provide the Member of Congress only that information releasable under 5 U.S.C. 552. Advise the Member of Congress that the written consent of the record subject is required before additional information may be disclosed. Do not contact the record subject to obtain consent for the disclosure to the Member of Congress unless the Congressional office specifically requests it be done.

(10) *Disclosures to the Comptroller General for the General Accounting Office*

(GAO). Records may be disclosed to the Comptroller General of the U.S., or authorized representative, in the course of the performance of the duties of the GAO.

(11) *Disclosures under court orders.* (i) Records may be disclosed under the order of a court of competent jurisdiction.

(ii) When a record is disclosed under this provision and the compulsory legal process becomes a matter of public record, make reasonable efforts to notify the individual to whom the record pertains. Notification sent to the last known address of the individual is sufficient. If the order has not yet become a matter of public record, seek to be advised as to when it will become public. Neither the identity or the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the record subject unless the court order has become a matter of public record.

(iii) The court order must bear the signature of a federal, state, or local judge. Orders signed by court clerks or attorneys are not deemed to be orders of a court of competent jurisdiction. A photocopy of the order, regular on its face, will be sufficient evidence of the court's exercise of its authority of the minimal requirements of SECNAVINST 5820.8A⁹, "Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel."

(12) *Disclosures to consumer reporting agencies.* Certain information may be disclosed to consumer reporting agencies (i.e., credit reference companies such as TRW and Equifax, etc.) as defined by the Federal Claims Collection Act of 1966 (31 U.S.C. 952d). Under the provisions of that Act, the following information may be disclosed to a consumer reporting agency:

(i) Name, address, taxpayer identification number (SSN), and other information necessary to establish the identity of the individual;

(ii) The amount, status, and history of the claim; and

⁹Copies available from the Judge Advocate General, Navy Department, (Code 34), 200 Stovall Street, Alexandria, VA 22332-2400.

(iii) The agency or program under which the claim arose. 31 U.S.C. 952d specifically requires that the FEDERAL REGISTER notice for the system of records from which the information will be disclosed indicate that the information may be disclosed to a consumer reporting agency.

(c) *Disclosures to commercial enterprises.* Records may be disclosed to commercial enterprises only under the criteria established by Secretary of the Navy Instruction 5720.42E and 42 U.S.C. 653, Parent Locator Service for Enforcement of Child Support.

(1) Any information required to be disclosed by Secretary of the Navy Instruction 5720.42E and 42 U.S.C. 653, Parent Locator Service for Enforcement of Child Support may be disclosed to a requesting commercial enterprise.

(2) Commercial enterprises may provide a consent statement signed by the individual indicating specific conditions for disclosing information from a record. Statements such as the following, if signed by the individual, are considered sufficient to authorize the disclosure: I hereby authorize the Department of the Navy to verify my SSN or other identifying information and to disclose my home address and telephone number to authorized representatives of (name of commercial enterprise) to be used in connection with my commercial dealings with that enterprise. All information furnished will be used in connection with my financial relationship with (name of commercial enterprise).

(3) When a consent statement as described in the preceding subsection is presented, provide the information to the commercial enterprise, unless the disclosure is prohibited by another regulation or Federal law.

(4) Blanket consent statements that do not identify the Department of Defense or Department of the Navy, or that do not specify exactly the information to be disclosed, may be honored if it is clear that the individual, in signing the consent statement, was seeking a personal benefit (i.e., loan for a house or automobile) and was aware of the type of information necessary to obtain the benefit sought.

(5) Do not honor requests from commercial enterprises for official evaluations of personal characteristics such as personal financial habits.

(d) *Disclosure of Health Care Records to the Public.* This paragraph applies to disclosure of information to the news media and the public concerning individuals treated or hospitalized in Department of the Navy medical facilities and, when the cost of care is paid by the Department of the Navy, in non-Federal facilities.

(1) Disclosures without the individual's consent. Normally, the following information may be disclosed without the individual's consent:

(i) Information required to be released by Secretary of the Navy Instruction 5720.42E and OPM Regulations and the Federal Personnel Manual, as well as the information listed in § 701.112(b)(2)(v) for military personnel and in § 701.112(b)(2).

(ii) For civilian employees; and

(iii) General information concerning medical conditions, i.e., date of admission or disposition; present medical assessment of the individual's condition if the medical practitioner has volunteered the information, i.e., the individual's condition presently is (stable) (good) (fair) (serious) (critical), and the patient is (conscious) (semi-conscious) (unconscious).

(2) Disclosures with the individual's consent. With the individual's informed consent, any information about the individual may be disclosed. If the individual is a minor or has been declared incompetent by a court of competent jurisdiction, the parent of the minor or appointed legal guardian of the incompetent may give consent on behalf of the individual.

(e) *Disclosure of Personal Information on Group/Bulk Orders.* Do not use personal information including complete SSNs, home addresses and phone numbers, dates of birth, etc., on group/bulk orders. This personal information should not be posted on lists that everyone listed on the orders sees. Such a disclosure of personal information violates the Privacy Act and this subpart and subpart G of this part.

(f) *Disclosure Accounting.* Keep an accurate record of all disclosures made from a record (including those made

with the consent of the individual) except those made to DoD personnel for use in performing their official duties; and those made under the FOIA. Disclosure accounting is to permit the individual to determine what agencies or persons have been provided information from the record, enable Department of the Navy activities to advise prior recipients of the record of any subsequent amendments or statements of dispute concerning the record, and provide an audit trail of Department of the Navy's compliance with 5 U.S.C. 552a.

(1) Disclosure accountings shall contain the date of the disclosure; a description of the information disclosed; the purpose of the disclosure; and the name and address of the person or agency to whom the disclosure was made.

(2) The record subject has the right of access to the disclosure accounting except when the disclosure was made at the request of a civil or criminal law enforcement agency under § 701.112(b)(7); or when the system of records has been exempted from the requirement to provide access to the disclosure accounting.

(g) *Methods of disclosure accounting.* Since the characteristics of various records maintained within the Department of the Navy vary widely, no uniform method for keeping disclosure accountings is prescribed. The primary criteria are that the selected method be one which will:

(1) Enable an individual to ascertain what persons or agencies have received disclosures pertaining to him/her;

(2) Provide a basis for informing recipients of subsequent amendments or statements of dispute concerning the record; and

(3) Provide a means to prove, if necessary that the activity has complied with the requirements of 5 U.S.C. 552a and this subpart and subpart G of this part.

(h) *Retention of Disclosure Accounting.* Maintain a disclosure accounting of the life of the record to which the disclosure pertains, or 5 years after the date of the disclosure, whichever is longer. Disclosure accounting records are normally maintained with the

record, as this will ensure compliance with § 701.112(f).

§ 701.113 Exemptions.

(a) *Using exemptions.* No system of records is automatically exempt from all provisions of 5 U.S.C. 552a. A system of records is exempt from only those provisions of 5 U.S.C. 552a that are identified specifically in the exemption rule for the system. Subpart G of this part contains the systems designated as exempt, the types of exemptions claimed, the authority and reasons for invoking the exemptions and the provisions of 5 U.S.C. 552a from which each system has been exempt. Exemptions are discretionary on the part of Department of the Navy and are not effective until published as a final rule in the FEDERAL REGISTER. The naval activity maintaining the system of records shall make a determination that the system is one for which an exemption may be established and then propose an exemption rule for the system. Submit the proposal to CNO (N09B30) for approval and publication in the FEDERAL REGISTER.

(b) *Types of exemptions.* There are two types of exemptions permitted by 5 U.S.C. 552a.

(1) *General exemptions.* Those that authorize the exemption of a system of records from all but specifically identified provisions of 5 U.S.C. 552a.

(2) *Specific exemptions.* Those that allow a system of records to be exempt from only a few designated provisions of 5 U.S.C. 552a.

(c) *Establishing exemptions.* (1) 5 U.S.C. 552a authorizes the Secretary of the Navy to adopt rules designating eligible systems of records as exempt from certain requirements. The Secretary of the Navy has delegated the CNO (N09B30) to make a determination that the system is one for which an exemption may be established and then propose and establish an exemption rule for the system. No system of records within Department of the Navy shall be considered exempt until the CNO (N09B30) has approved the exemption and an exemption rule has been published as a final rule in the FEDERAL REGISTER. A system of records is exempt from only those provisions of 5

U.S.C. 552a that are identified specifically in the Department of the Navy exemption rule for the system.

(2) No exemption may be established for a system of records until the system itself has been established by publishing a notice in the FEDERAL REGISTER, at least 30 days prior to the effective date, describing the system. This allows interested persons an opportunity to comment. An exemption may not be used to deny an individual access to information that he or she can obtain under Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program."

(d) *Exemption for classified material.* All systems of records maintained by the Department of the Navy shall be exempt under section (k)(1) of 5 U.S.C. 552a, to the extent that the systems contains any information properly classified under E.O. 12958 and that is required by that E.O. to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein which contain isolated items of properly classified information.

NOTE: Department of the Navy Privacy Act systems of records which contain classified information automatically qualify for a (k)(1) exemption, without establishing an exemption rule.

(e) *Exempt records in nonexempt systems.* (1) An exemption rule applies to the system of records for which it was established. If a record from an exempt system is incorporated intentionally into a system that has not been exempt, the published notice and rules for the nonexempt system will apply to the record and it will not be exempt from any provisions of 5 U.S.C. 552a.

(2) A record from one component's (i.e., Department of the Navy) exempted system that is temporarily in the possession of another component (i.e., Army) remains subject to the published system notice and rules of the originating component's (i.e., Department of the Navy). However, if the non-originating component incorporates the record into its own system of records, the published notice and rules for the system into which it is incorporated shall apply. If that system of records

has not been exempted, the record shall not be exempt from any provisions of 5 U.S.C. 552a.

(3) A record accidentally misfiled into a system of records is governed by the published notice and rules for the system of records in which it actually should have been filed.

(f) *General exemptions—(1) Central Intelligence Agency (CIA).* The Department of the Navy is not authorized to establish an exemption for records maintained by the CIA under subsection (j)(1) of 5 U.S.C. 552a.

(2) *Law enforcement.* (i) The general exemption provided by subsection (j)(2) of 5 U.S.C. 552a may be established to protect criminal law enforcement records maintained by Department of the Navy.

(ii) To be eligible for the (j)(2) exemption, the system of records must be maintained by an element that performs, as one of its principal functions, the enforcement of criminal laws. The Naval Investigative Service, Naval Inspector General, and military police activities qualify for this exemption.

(iii) Criminal law enforcement includes police efforts to detect, prevent, control, or reduce crime, or to apprehend criminals, and the activities of prosecution, court, correctional, probation, pardon, or parole authorities.

(iv) Information that may be protected under the (j)(2) exemption includes:

(A) Information compiled for the purpose of identifying criminal offenders and alleged criminal offenders consisting of only identifying data and notations of arrests; the nature and disposition of criminal charges; and sentencing, confinement, release, parole, and probation status;

(B) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; and

(C) Reports identifiable to an individual, compiled at any stage of the enforcement process, from arrest, apprehension, indictment, or referral of charges through final release from the supervision that resulted from the commission of a crime.

(v) The (j)(2) exemption does not apply to:

(A) Investigative records maintained by a naval activity having no criminal law enforcement duties as one of its principle functions, or

(B) Investigative records compiled by any element concerning individual's suitability, eligibility, or qualification for duty, employment, or access to classified information, regardless of the principle functions of the naval activity that compiled them.

(vi) The (j)(2) exemption established for a system of records maintained by a criminal law enforcement activity cannot protect law enforcement records incorporated into a nonexempt system of records or any system of records maintained by an activity not principally tasked with enforcing criminal laws. All system managers, therefore, are cautioned to comply strictly with Department of the Navy regulations or instructions prohibiting or limiting the incorporation of criminal law enforcement records into systems other than those maintained by criminal law enforcement activities.

(g) *Specific exemptions.* Specific exemptions permit certain categories of records to be exempted from specific provisions of 5 U.S.C. 552a. Subsections (k)(1)-(7) of 5 U.S.C. 552a allow exemptions for seven categories of records. To be eligible for a specific exemption, the record must meet the corresponding criteria.

NOTE: Department of the Navy Privacy Act systems of records which contain classified information automatically qualify for a (k)(1) exemption, without an established exemption rule.

(1) (k)(1) exemption: Information properly classified under Secretary of the Navy Instruction 5720.42E, "Department of the Navy Freedom of Information Act Program" and E.O. 12958, in the interest of national defense or foreign policy.

(2) (k)(2) exemption: Investigatory information (other than that information within the scope of §701.113(f)(2) compiled for law enforcement purposes. If maintaining the information causes an individual to be ineligible for or denied any right, benefit, or privilege that he or she would otherwise be eligible for or entitled to under Federal law, then he or she shall be given access to the information, except for the information that would identify a confidential

source (see § 701.113(h), "confidential source"). The (k)(2) exemption, when established, allows limited protection on investigative records maintained for use in personnel and administrative actions.

(3) (k)(3) exemption: Records maintained in connection with providing protective services to the President of the United States and other individuals under 18 U.S.C. 3056.

(4) (k)(4) exemption: Records required by Federal law to be maintained and used solely as statistical records that are not used to make any determination about an identifiable individual, except as provided by 13 U.S.C. 8.

(5) (k)(5) exemption: Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent such material would reveal the identity of a confidential source. (See §701.113(h), "confidential source"). This exemption allows protection of confidential sources in background investigations, employment inquiries, and similar inquiries used in personnel screening to determine suitability, eligibility, or qualifications.

(6) (k)(6) exemption: Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal or military service if the disclosure would compromise the objectivity or fairness of the testing or examination process.

(7) (k)(7) exemption: Evaluation material used to determine potential for promotion in the military services, but only to the extent that disclosure would reveal the identity of a confidential source. (See §701.113(h), "confidential source".)

(h) *Confidential Source.* Promises of confidentiality are to be given on a limited basis and only when essential to obtain the information sought. Establish appropriate procedures for granting confidentiality and designate those categories of individuals authorized to make such promises.

[59 FR 55348, Nov. 7, 1994, as amended at 61 FR 2917, Jan. 30, 1996]

§ 701.114 Enforcement actions.

(a) *Administrative remedies.* An individual who alleges he or she has been affected adversely by a naval activity's violation of 5 U.S.C. 552a or this subpart and subpart G of this part shall be permitted to seek relief from SECNAV through proper administrative channels.

(b) *Civil court actions.* After exhausting all administrative remedies, an individual may file suit in Federal court against a naval activity for any of the following acts:

(1) *Denial of an amendment request.* The activity head, or his or her designee wrongfully refuses the individual's request for review of the initial denial of an amendment or, after review, wrongfully refuses to amend the record;

(2) *Denial of access.* The activity wrongfully refuses to allow the individual to review the record or wrongfully denies his or her request for a copy of the record;

(3) *Failure to meet recordkeeping standards.* The activity fails to maintain an individual's record with the accuracy, relevance, timeliness, and completeness necessary to assure fairness in any determination about the individual's rights, benefits, or privileges and, in fact, makes an adverse determination based on the record; or

(4) *Failure to comply with Privacy Act.* The activity fails to comply with any other provision of 5 U.S.C. 552a or any rule or regulation promulgated under 5 U.S.C. 552a and thereby causes the individual to be adversely affected.

(c) *Criminal penalties.* Subsection (i)(1) of 5 U.S.C. 552a authorizes three criminal penalties against individuals for violations of its provisions. All three are misdemeanors punishable by fines of \$5,000.

(1) *Wrongful disclosure.* Any member or employee of Department of the Navy who, by virtue of his or her employment or position, has possession of or access to records and willfully makes a disclosure knowing that disclosure is in violation of 5 U.S.C. 552a or this subpart and subpart G of this part.

(2) *Maintaining unauthorized records.* Any member or employee of Department of the Navy who willfully main-

tains a system of records for which a notice has not been published under periodic Chief of Naval Operations Notes (OPNAVNOTES) 5211, "Current Privacy Act Issuances."

(3) *Wrongful requesting or obtaining records.* Any person who knowingly and willfully requests or obtains information concerning an individual under false pretenses.

§ 701.115 Computer matching program.

(a) *General.* 5 U.S.C. 552a and this subpart and subpart G of this part are applicable to certain types of computer matching, i.e., the computer comparison of automated systems of records. There are two specific kinds of matching programs that are fully governed by 5 U.S.C. 552a and this subpart and subpart G of this part:

(1) Matches using records from Federal personnel or payroll systems of records;

(2) Matches involving Federal benefit programs to accomplish one or more of the following purposes:

(i) To determine eligibility for a Federal benefit.

(ii) To comply with benefit program requirements.

(iii) To effect recovery of improper payments or delinquent debts from current or former beneficiaries.

(b) *The record comparison must be a computerized one.* Manual comparisons are not covered, involving records from two or more automated systems of records (i.e., systems of records maintained by Federal agencies that are subject to 5 U.S.C. 552a); or a Department of the Navy automated systems of records and automated records maintained by a non-Federal agency (i.e., State or local government or agent thereof). A covered computer matching program entails not only the actual computerized comparison, but also preparing and executing a written agreement between the participants, securing approval of the Defense Data Integrity Board, publishing a matching notice in the FEDERAL REGISTER before the match begins, ensuring that investigation and due process are completed, and taking ultimate action, if any.

Subpart G—Privacy Act Exemptions

AUTHORITY: Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a).

SOURCE: 59 FR 55363, Nov. 7, 1994, unless otherwise noted.

§ 701.116 Purpose.

Subparts F and G of this part contain rules promulgated by the Secretary of the Navy, pursuant to 5 U.S.C. 552a (j) and (k), and subpart F, § 701.113, to exempt certain systems of Department of the Navy records from specified provisions of 5 U.S.C. 552a.

§ 701.117 Exemption for classified records.

All systems of records maintained by the Department of the Navy shall be exempt from the requirements of the access provision of the Privacy Act (5 U.S.C. 552a(d)) under the (k)(1) exemption, to the extent that the system contains information properly classified under E.O. 12958 and that is required by that E.O. to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein which contain isolated items of properly classified information.

[59 FR 55363, Nov. 7, 1994, as amended at 61 FR 2917, Jan. 30, 1996]

§ 701.118 Exemptions for specific Navy record systems.

(a) *System Identifier and Name:* N01070–9, White House Support Program.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4) (G) through (I), and (f).

Authority: 5 U.S.C. 552a(k) (1), (2), (3), and (5).

Reasons: Exempted portions of this system contain information which has been properly classified under E.O. 12958, and which is required to be kept secret in the interest of national defense or foreign policy. Exempted portions of this system may also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified informa-

tion, and which was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record. Exempted portions of this system may also contain information collected and maintained in connection with providing protective services to the President and other individuals protected pursuant to 18 U.S.C. 3056. Exempted portions of this system may also contain investigative records compiled for law enforcement purposes, the disclosure of which could reveal the identity of sources who provide information under an express or implied promise of confidentiality, compromise investigative techniques and procedures, jeopardize the life or physical safety of law-enforcement personnel, or otherwise interfere with enforcement proceedings or adjudications.

(b) *System Identifier and Name:* N01131–1, Officer Selection and Appointment System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

Authority: 5 U.S.C. 552a(k)(1), (5), (6), and (7).

Reasons: Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that does not disclose the identity of a confidential source.

(c) *System Identifier and Name:* N01133–2, Recruiting Enlisted Selection System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

Authority: 5 U.S.C. 552a(k)(1), (5), (6), and (7).

Reasons: Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access

to unclassified material and to information that does not disclose the identity of a confidential source.

(d) *System Identifier and Name:* N01640-1, Individual Correctional Records.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

Authority: 5 U.S.C. 552a(j)(2).

Reason: Granting individuals access to portions of these records pertaining to or consisting of, but not limited to, disciplinary reports, criminal investigations, and related statements of witnesses, and such other related matter in conjunction with the enforcement of criminal laws, could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefor, necessitate the exemption of this system of records from the requirement of the other cited provisions.

(e) *System Identifier and Name:* N01754-3, Navy Child Development Services Program.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

Authority: 5 U.S.C. 552a(k)(2).

Reasons: Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources from embarrassment or recrimination, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish informa-

tion under an express promise of confidentiality be protected. Additionally, granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accountings, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children.

(f) *System Identifier and Name:* N03834-1, Special Intelligence Personnel Access File.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4) (G) through (I), and (f).

Authority: 5 U.S.C. 552a(k) (1) and (5).

Reasons: Exempted portions of this system contain information that has been properly classified under E.O. 12356, and that is required to be kept secret in the interest of national defense or foreign policy. Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified information and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(g) *System Identifier and Name:* N04060-1, Navy and Marine Corps Exchange Security Files.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4) (G) through (I), and (f).

Authority: 5 U.S.C. 552a(k)(2).

Reasons: Granting individuals access to information collected and maintained by these activities relating to the enforcement of criminal laws could interfere with orderly investigations, with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and could also reveal and render ineffectual investigative

techniques, sources, and methods used by these activities.

(h) [Reserved]

(i) *System identifier and name:* N05041-1, Inspector General (IG) Records.

(1) *Exemption:* Portions of this system of records may be exempt from the provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f).

(2) *Authority:* 5 U.S.C. 552a(k)(1) and (k)(2).

(3) *Reasons:* (i) From subsection (c)(3) because the release of the disclosure accounting would permit individuals to obtain valuable information concerning the nature of the investigation and would present a serious impediment to the orderly conduct of any investigative activities. Such accounting could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(ii) From subsections (d) and (f) because access to the records would inform individuals of the existence and nature of the investigation; provide information that might result in the concealment, destruction, or fabrication of evidence; possibly jeopardize the safety and well-being of informants, witnesses and their families; likely reveal and render ineffectual investigatory techniques and methods and sources of information; and possibly result in the invasion of the personal privacy of third parties. Access could result in the release of properly classified information which could compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with the ongoing investigation and impose an impossible administrative burden by requiring investigations to be continually reinvestigated.

(iii) From subsection (e)(1) because in the course of the investigation it is not always possible, at least in the early stages of the inquiry, to determine relevance and or necessity as such determinations may only occur after the information has been evaluated. Information may be obtained concerning the actual or potential violation of laws or regulations other than those relating to the ongoing investigation. Such information should be retained as it can aid in establishing patterns of improper activity and can provide valu-

able leads in the conduct of other investigations.

(iv) From subsection (e)(4)(G) and (H) because this system of records is exempt from individual access pursuant to subsection (k)(1) and (k)(2) of the Privacy Act of 1974.

(v) From subsection (e)(4)(I) because it is necessary to protect the confidentiality of sources and to protect the privacy and physical safety of witnesses. Although the system is exempt from this requirement, the Department of the Navy has published a notice in broad, generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires.

(j) *System Identifier and Name:* N05300-3, Faculty Professional Files.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4) (G) and (H), and (f).

Authority: 5 U.S.C. 552a(k)(5).

Reasons: Exempted portions of this system contain information considered relevant and necessary to make a release determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(k) *System Identifier and Name:* N05354-1, Equal Opportunity Information Management System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) through (I), and (f).

Authority: 5 U.S.C. 552a(k)(1) and (5).

Reasons: Granting access to information in this system of records could result in the disclosure of classified material, or reveal the identity of a source who furnished information to the Government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that will not disclose the identity of a confidential source.

(l) *System Identifier and Name:* N05520-1, Personnel Security Eligibility Information System.

Exemption: Portions of this system of records are exempt from the following

subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) and (I), and (f).

Authority: 5 U.S.C. 552a(k) (1), (2), (5), and (7).

Reasons: Granting individuals access to information collected and maintained in this system of records could interfere with orderly investigations; result in the disclosure of classified material; jeopardize the safety of informants, witnesses, and their families; disclose investigative techniques; and result in the invasion of privacy of individuals only incidentally related to an investigation. Material will be screened to permit access to unclassified information that will not disclose the identity of sources who provide the information to the government under an express or implied promise of confidentiality.

(m) *System identifier and name:* N05520-4, NCIS Investigative Files System.

Exemption (1): Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

Authority (1): 5 U.S.C. 552a(j)(2).

Reason (1): Granting individuals access to information collected and maintained by this activity relating to the enforcement of criminal laws could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefor, necessitate the exemption of this system of records from the requirement of the other cited provisions.

Exemption (2): Portions of this system of records are exempt from the fol-

lowing subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

Authority (2): 5 U.S.C. 552a(k) (1), (3), (4), (5) and (6).

Reason (2): The release of disclosure accountings would permit the subject of an investigation to obtain valuable information concerning the nature of that investigation, and the information contained, or the identity of witnesses or informants, would therefor present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record. Access to the records contained in this system would inform the subject of the existence of material compiled for law enforcement purposes, the premature release of which could prevent the successful completion of investigation, and lead to the improper influencing of witnesses, the destruction of records, or the fabrication of testimony. Exempt portions of this system also contain information that has been properly classified under E.O. 12958, and that is required to be kept secret in the interest of national defense or foreign policy.

Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified information, and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record. The notice of this system of records published in the FEDERAL REGISTER sets forth the basic statutory or related authority for maintenance of the system.

The categories of sources of records in this system have been published in the FEDERAL REGISTER in broad generic terms. The identity of specific sources, however, must be withheld in order to protect the confidentiality of the source, of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

This system of records is exempted from procedures for notice to an individual as to the existence of records pertaining to him/her dealing with an actual or potential civil or regulatory investigation, because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation, pending or future. Mere notice of the fact of an investigation could inform the subject or others that their activities are under, or may become the subject of, an investigation. This could enable the subjects to avoid detection, to influence witnesses improperly, to destroy records, or to fabricate testimony.

Exempt portions of this system containing screening board reports. Screening board reports set forth the results of oral examination of applicants for a position as a special agent with the Naval Investigation Service Command. Disclosure of these records would reveal the areas pursued in the course of the examination and thus adversely affect the result of the selection process. Equally important, the records contain the candid views of the members composing the board. Release of the records could affect the willingness of the members to provide candid opinions and thus diminish the effectiveness of a program which is essential to maintaining the high standard of the Special Agent Corps., i.e., those records constituting examination material used solely to determine individual qualifications for appointment in the Federal service.

(n) *System identifier and name:* N05520-5, Personnel Security Program Management Records System.

Exemption: Portions of this system of records are exempt from the following subsections of 5 U.S.C. 552a: (d)(1-5).

Authority: 5 U.S.C. 552a(k)(1) and (k)(5).

Reasons: Granting individuals access to information collected and maintained in this system of records could result in the disclosure of classified material; and jeopardize the safety of informants, and their families. Further, the integrity of the system must be ensured so that complete and accurate records of all adjudications are maintained. Amendment could cause

alteration of the record of adjudication.

(o) *System Identifier and Name:* N05527-1, Security Incident System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), and (e)(4)(G) through (I), (e)(5), (e)(8), (f) and (g).

Authority: 5 U.S.C. 552a(j)(2).

Reasons: Granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in concealment, destruction, or fabrication of evidence, and jeopardize the safety and well being of informants, witnesses and their families, and of law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to his or her records, and the reason therefore, necessitate the exemption of this system of records from the requirements of other cited provisions.

(p) *System Identifier and Name:* N05527-4, Naval Security Group Personnel Security/Access Files.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f). *Authority:* 5 U.S.C. 552a(k)(1) through (k)(5).

Reasons: Exempt portions of this system contain information that has been properly classified under E.O. 12958, and that is required to be kept secret in the interest of national defense or foreign policy. Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualification, eligibility or suitability for access to classified special intelligence information, and that was obtained by providing an express or implied promise to the source that his or her identity

would not be revealed to the subject of the record.

(q) *System Identifier and Name:* N05800-1, Legal Office Litigation/Correspondence Files.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(1), and (f)(2), (3), and (4).

Authority: 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), (k)(6), and (k)(7).

Reasons: Subsection (d) because granting individuals access to information relating to the preparation and conduct of litigation would impair the development and implementation of legal strategy. Accordingly, such records are exempt under the attorney-client privilege. Disclosure might also compromise on-going investigations and reveal confidential informants. Additionally, granting access to the record subject would seriously impair the Navy's ability to negotiate settlements or pursue other civil remedies. Amendment is inappropriate because the litigation files contain official records including transcripts, court orders, investigatory materials, evidentiary materials such as exhibits, decisional memorandum and other case-related papers. Administrative due process could not be achieved by the "exparte" correction of such materials.

Subsection (e)(1) because it is not possible in all instances to determine relevancy or necessity of specific information in the early stages of case development. What appeared relevant and necessary when collected, ultimately may be deemed unnecessary upon assessment in the context of devising legal strategy. Information collected during civil litigation investigations which is not used during subject case is often retained to provide leads in other cases or to establish patterns of activity.

Subsection (f)(2), (3), and (4) because this record system is exempt from the individual access provisions of subsection (d).

(r) *System Identifier and Name:* N01000-5, Naval Clemency and Parole Board Files.

Exemption: Portions of this system of records are exempt from the following

subsections of the Privacy Act: (c)(4), (d), (e)(4)(G), and (f).

Authority: 5 U.S.C. 552a(j)(2).

Reasons: Granting individuals access to records maintained by this Board could interfere with internal processes by which Board personnel are able to formulate decisions and policies with regard to clemency and parole in cases involving naval prisoners and other persons under the jurisdiction of the Board. Material will be screened to permit access to all material except such records or documents as reflect items of opinion, conclusion, or recommendation expressed by individual board members or by the board as a whole.

The exemption of the individual's right to access to portions of these records, and the reasons therefore, necessitate the partial exemption of this system of records from the requirements of the other cited provisions.

(s) *System Identifier and Name:* N06320-2, Family Advocacy Program System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

Authority: 5 U.S.C. 552a(k)(2) and (k)(5).

Reasons: Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources from embarrassment or recriminations, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Additionally, granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accounting, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders or alleged offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children.

Exempted portions of this system also contain information considered

relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment and Federal contracts, and that was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(t) *System Identifier and Name:* N12930-1, Human Resources Group Personnel Records.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(4)(G) and (H), and (f).

Authority: 5 U.S.C. 552a(k)(5) and (k)(6).

Reasons: Exempted portions of this system contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by providing express or implied promise to the source that his or her identity would not be revealed to the subject of the record. Exempted portions of this system also contain test or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would comprise the objectivity or fairness of the testing or examination process.

[59 FR 55363, Nov. 7, 1994, as amended at 61 FR 2917, Jan. 30, 1996; 62 FR 15615, Apr. 2, 1997; 62 FR 61914, Nov. 20, 1997; 63 FR 25773, May 11, 1998]

§ 701.119 Exemptions for Specific Marine Corps Record Systems.

(a) *System Identifier and Name:* MMN00018, Base Security Incident Reporting System.

Exemption: Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e) (2) and (3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

Authority: 5 U.S.C. 552a(j)(2).

Reasons: Granting individuals access to information collected and maintained by these activities relating to the enforcement of criminal laws could interfere with orderly investigations, with the orderly administration of justice, and might enable suspects to avoid detection or apprehension. Dis-

closure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to his or her records, and the reasons therefore, necessitate the exemption of this system of records from the requirements of other cited provisions.

(b) *System Identifier and Name:* MIN00001, Personnel and Security Eligibility and Access Information System.

Exemption: Portions of this system of records are exempt for the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

Authority: 5 U.S.C. 552a(k)(2), (k)(3), and (k)(5), as applicable.

Reasons: Exempt portions of this system contain information that has been properly classified under E.O. 12958, and that is required to be kept secret in the interest of national defense or foreign policy.

Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified, compartmented, or otherwise sensitive information, and was obtained by providing an expressed or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

Exempt portions of this system further contain information that identifies sources whose confidentiality must be protected to ensure that the privacy and physical safety of these witnesses and informants are protected.

[59 FR 55363, Nov. 7, 1994, as amended at 61 FR 2917, Jan. 30, 1996]